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IN THE

SUPREME COURT

OF THE

UNITED STATES

76-1706

OCTOBER TERM, 1976

No. .....

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES, ET AL.,

Respondents,

v.

THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Counsel for Petitioner
SLADE GORTON,
Attorney General,
State of Washington,
RICHARD H. HOLMQUIST,
Senior Assistant Attorney General,
RICHARD D. HICKS,
Assistant Attorney General
Temple of Justice
Olympia, Washington 98504
Telephone (206) 753-5528

STATE PRINTING PLANT OLYMPIA, WASHINGTON

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Temple of Justice
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THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Washington entered in the above-entitled case on February 3, 1977. The judgment became final on March 7, 1977.

OPINION BELOW

The opinion of the Washington State Supreme Court, reproduced in Appendix A hereto, is reported in 88 Wn.2d 315, 559 P.2d 997 (1977).

JURISDICTION

The opinion of the court below was filed on February 3, 1977 (Appendix A, *infra*). In Washington, no separate judgment is entered. The remittitur was entered on March 7, 1977 (Appendix B). Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Do the Commerce Clause and the Import-Export Clause of the Federal Constitution create an absolute immunity from state taxation for local stevedoring activity?

2. In testing, under the Commerce and Import-Export Clauses, the validity of a general, nondiscriminatory state tax as applied to local stevedoring activity, are the *Stevedoring Cases* [1] any longer controlling after *Complete Auto Transit, Inc. v. Brady*, No. 76-29,..... U.S. ....., 51 L.Ed.2d 326, 97 S.Ct ..... (March 7, 1977) and *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 46 L.Ed.2d 495, 96 S.Ct. 535 (1976)?

CONSTITUTIONAL PROVISIONS, APPLICABLE STATUTES AND ADMINISTRATIVE RULES

United States Constitution, Article I, Section 10, Clause 2. United States Constitution, Article I, Section 8, Clause 3.

[1] *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90, 82 L.Ed. 68, 58 S.Ct. 72 (1937); *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 91 L.Ed. 993, 67 S.Ct. 815 (1947).

Revised Code of Washington 82.04.220 and 82.04.290 (Appendix C). Washington Administrative Code 458-20-193D (Appendix D).

STATEMENT OF THE CASE

The Washington State Supreme Court held that the business activity of local stevedores who load and unload ships which sail in interstate and foreign commerce was "absolutely protected" from the Washington Business and Occupation tax by virtue of the Commerce Clause[2] and the Import-Export Clause.[3] This question was the sole issue raised in plaintiffs' petition for a declaratory judgment on the validity of the state's rule which upheld the tax on such activity.[4]

Relying on *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90, 82 L.Ed. 68, 58 S.Ct. 72 (1937)[5] and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 91 L.Ed. 993, 67 S.Ct. 815 (1947), hereafter *Stevedoring Cases*; and also citing *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 95 L.Ed. 573, 71 S.Ct. 508 (1951), the Washington Supreme Court gave the following rationale for striking down the tax[6] as applied to stevedoring:

[2] U.S. Constitution, Article I, section 8.

[3] U.S. Constitution, Article I, section 10.

[4] Plaintiff's petition is attached as Appendix E and the opinion of the trial court as Appendix F. The assignment of error for the Washington State Supreme Court's review as found in appellant's brief before that Court is attached as Appendix G.

[5] This present case before the Court involves the identical state, identical stevedores and identical tax as does the *Puget Sound Stevedoring Co.* case, *supra*, decided in 1937. It is, of course, this unusual circumstance with which the Washington State Supreme Court was faced.

[6] This business and occupation tax, a gross receipts tax, is not unfamiliar to this Court. See *General Motors Corp. v. Washington*,

> "The United States Supreme Court obviously viewed stevedoring as an integrated inseparable part of commerce by sea, and hence absolutely protected." 88 Wn.2d at 318, 559 P.2d at 998

In brief, the decision below held that this Court still requires an otherwise valid state tax be struck down if it falls on one species of business activity connected with commerce, i.e. stevedoring. And the tax must fall even if that activity takes piace entirely within one state.

There was no showing of lack of nexus. Nor was there a showing that the tax is unrelated to services provided by the state; or that the tax discriminates; or that the tax is unfairly apportioned; or that it is a licensing provision; or that it is an act of direct regulation of commerce. Finally, there was no showing that it is an impost or duty.

The court below was fully aware of the anomalous nature of its holding; it believed it had no choice because of the prior opinions of this Court in the *Stevedoring Cases*:

> "The courts of the several states seem to be unanimous in their recognition of this obligation to follow controlling Supreme Court precedent on such matters.
> "Fully mindful of our prior criticism of the principles and reasoning of the stevedore cases (*see Washington-Oregon Shippers Cooperative Ass'n v. Schumacher*, 59 Wn.2d 159, 167, 367 P.2d 112, 115-16 (1961)), we must nevertheless hold the instant tax on stevedoring invalid."

377 U.S. 436, 12 L.Ed. 2d 430, 84 S.Ct. 1564 (1964), and *Standard Pressed Steel Co. v. Department of Revenue*, 419 U.S. 560, 42 L.Ed.2d 719, 95 S.Ct. 706 (1975).

> 88 Wn.2d 319-320, 559 P.2d 999; [footnote omitted].

Although conscious of the principles held controlling in prior decisions of this Court such as *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 44 L.Ed.2d 1, 95 S.Ct. 1538 (1975) and *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 46 L.Ed.2d 495, 96 S.Ct. 535 (1976)—principles reaffirmed by this Court in *Complete Auto Transit, Inc. v. Brady*, No. 76-29 ..... U.S. ....., 51 L.Ed.2d 326, 97 S.Ct. ..... (March 7, 1977) the court below held that these principles are to be ignored because of the *Stevedoring Cases*. The Washington Supreme Court did not even consider the principles recently handed down by this court because it saw itself as absolutely constricted by the *Stevedoring Cases*. It saw its duty to this Court as completely barring it from even considering whether principles in prior decisions have been overruled by principles in current decisions.

REASONS FOR GRANTING THE WRIT

In order to eliminate the unique and anomalous status of stevedoring as compared to all other businesses involving interstate and foreign commerce and thus provide for a uniform application of the constitutional principles enumerated by this Court, the writ of certiorari should be granted.

In *Michelin Tire*, *supra*, and *Complete Auto Transit*, *supra*, this Court made a searching reexamination of its prior decisions delineating the scope of state taxing power under the Import-Export clause

and the Commerce Clause. As part of this reexamination, it firmly established the principles to be used in testing the validity of the state tax under each of these two constitutional provisions. And in so doing, it overruled landmark decisions which were inconsistent with these principles.

In holding that a general, nondiscriminatory tax was not a duty or impost within the meaning of the import-export clause, *Michelin Tire*, *supra*, overruled *Low v. Austin*, 80 U.S. (13 Wall.), 29 L.Ed. 517 (1872).[7] In holding that the commerce clause creates no " 'free trade' immunity" (*Complete Auto Transit*, *supra*, p. 330) for interstate commerce, but instead permits a fairly apportioned and nondiscriminatory tax even upon the privilege of engaging in a purely interstate business, *Complete Auto Transit*, *supra*, overruled *Spector Motor Service, Inc.*, *supra*.

The decison below, and the *Stevedoring Cases* on which it was based, are not reconcilable with the principles established in *Michelin Tire*, *supra*, and *Complete Auto Transit*, *supra*. The *Stevedoring Cases* should go the way of *Low*, *supra*, and *Spector Motors*, *supra*. By so overruling the *Stevedoring Cases* the Court will complete the process of clarifying the scope of state taxing power which it commenced in *Michelin Tire*, *supra*, and *Complete Auto Transit*, *supra*. Further, it will eliminate the last vestige of now discarded interpretations of the Im-

[7]At issue in *Michelin*, *supra*, of course, was a general *ad valorem* tax but footnote 7 at p. 288 of that opinion makes clear by using an excise tax illustration that neither kind of tax is of this "particular category" subject to be prohibited by the import-export clause.

port-Export Clause and the Commerce Clause, along with the unworkable and essentially irrational distinctions which those interpretations have engendered.[8]

CONCLUSION

In order to eliminate the unique and anomalous status of stevedoring business from all other businesses involving interstate and foreign commerce the writ of certiorari should be granted. This will assure a uniform nationwide application of the Commerce Clause and Import-Export Clause to the stevedoring business.

Alternatively, the judgment of the court below should be vacated and the case remanded with instructions to reconsider the decision in the light of *Complete Auto Transit*, *supra*, and *Michelin*, *supra*.

Respectfully submitted,

SLADE GORTON,
Attorney General,
State of Washington,

RICHARD H. HOLMQUIST,
Senior Assistant Attorney General,

RICHARD D. HICKS,
Assistant Attorney General,

Counsel for Petitioner.

[8]For examples of the type of problems which the *Stevedoring Cases* present to state courts, and the casuistic distinctions which these cases force state courts to engage in, see *Martin Ship Serv. Co. v. Los Angeles*, 34 Cal.2d 793, 215 P.2d 24 (1950); *Washington-Oregon Shippers Cooperative Ass'n v. Schumacher*, 59 Wn.2d 159, 367 P.2d 112 (1961); *HC&D Moving & Storage Co. v. Yamane*, 48 Hawaii 486, 405 P.2d 382 (1965).

APPENDIX A

[No. 44140. En Banc. February 3, 1977]

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES, ET AL, *Respondents*, v. THE DEPARTMENT OF REVENUE, *Appellant*.

[1] Constitutional Law—Courts—Stare Decisis—Federal Constitution. Decisions of the United States Supreme Court interpreting and applying provisions of the federal constitution are controlling upon state courts in ruling upon the same issues.

[2] Taxation—Commerce—Exports—Tax on Stevedoring—Validity. The activity of stevedoring is a part of commerce, and application of the business and occupation tax to a stevedoring business is invalid under both the interstate commerce clause (U.S. Const. art. 1, § 8) and the import-export clause (U.S. Const. art. 1, § 10).

UTTER and DOLLIVER, JJ., dissent by separate opinion; HOROWITZ and HICKS, JJ., did not participate in the disposition of this case.

Nature of Action: Challenge against the imposition of the general business and occupation tax on the activity of stevedoring.

Superior Court: The Superior Court for Thurston County, No. 51818, Frank E. Baker, J., entered a judgment in favor of the plaintiffs on November 24, 1975, declaring the state tax to be in violation of the interstate commerce clause and the import-export clause.

Supreme Court: On appeal by the Department of Revenue, the Supreme Court *affirms* the trial court decision on the same constitutional grounds.

Slade Gorton, Attorney General, and *Richard D. Hicks, Assistant,* for appellant.

Bogle & Gates, John T. Piper, and *D. Michael Young,* for respondents.

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This opinion was prepared by Justice Robert T. Hunter prior to his retirement. It is adopted by the undersigned Justices as the opinion of this Court.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[No. 44140 En Banc. February 3, 1977]

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES AND WASHINGTON PUBLIC PORTS ASSOCIATION, *Respondents*, v. STATE OF WASHINGTON, DEPARTMENT OF REVENUE, *Appellant*.

The State appeals from a declaratory judgment of the Superior Court for Thurston County, declaring a state tax repugnant to the United States Constitution. This court has taken jurisdiction as the proper forum for disposition of such issue, pursuant to RCW 2. 06.030(c) and ROA I-14(1)(c).

The trial court held that WAC 458-20-193D, as amended in 1974 to apply the state's general business and occupation tax to stevedoring activity, contravenes the Interstate Commerce Clause (U.S. Const.

1, § 8, Cl. 3) and the Import-Export Clause (U.S. Const. art. 1, § 10, Cl. 2). The trial court was adhering to two United States Supreme Court decisions, one of them having been brought up from this jurisdiction, on the precise issue raised in this appeal. We find the two cases to be indistinguishable, factually, from the instant case; hence, we also adhere to them, and affirm the trial court.

The first case the Supreme Court decided on the issue was *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90, 82 L. Ed. 68, 58 S. Ct. 72 (1937). Our court had upheld a state tax on the loading and unloading of ships plying interstate and foreign commerce. That decision was appealed to the United States Supreme Court, which reversed, holding that the business of loading and unloading ships *is* interstate commerce and is therefore not taxable by the state. We quote language from *Puget Sound Stevedoring Co. v. Tax Commission*, *supra* at 93, to show the court's reasoning:

> "[S]tevedoring services are essential to waterborne commerce and always commence in the hold of the vessel and end at the 'first place of rest' and vice versa." * * * The movement is continuous, is covered by a single contract, and is necessary in all its stages if transportation is to be accomplished without unreasonable impediments.

Almost 10 years later the City of New York attempted to impose the same type of tax on identical stevedoring activity. The New York Supreme Court struck the tax down on authority of *Puget Sound*,

supra. The Court of Appeals then affirmed, and certiorari was granted by the United States Supreme Court, which also affirmed. *Joseph v. Carter & Weekes Co.*, 330 U.S. 422, 91 L. Ed. 993, 67 S. Ct. 815 (1947), thus became the second of what we refer to, for the sake of convenience, as the "stevedoring cases."

The petitioners in *Joseph v. Carter & Weekes Co.*, *supra* at 425-26, presented the Supreme Court with the same argument that is now presented by appellant to this court, quoting as follows:

> Petitioners recognize the force of the *Puget Sound* case as a precedent. Their argument is that subsequent holdings of this Court have indicated that the reasons which underlay the decisions are no longer controlling in judicial examination of the constitutionality of state taxation of the gross proceeds derived from commerce, subject to federal regulation. They cite, among others, these later decisions: *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250; *Southern Pacific Co. v. Gallagher*, 306 U.S. 167; *McGoldrick v. Berwind-White Co.*, 309 U.S. 33; *Department of Treasury v. Wood Preserving Corp.*, 313 U.S. 62.

The Court then analyzed the cases, stating as follows:

> Upon examination this history gives an impression that there has been a doubt as to the continued vitality of *Puget Sound*. We come now face to face with the problem of overruling or approving the case.

Joseph v. Carter & Weekes Co., *supra* at 430.

Puget Sound was reaffirmed. The cases cited by petitioners were distinguished on the reasoning that

stevedoring is essentially a part of the commerce itself, more a part of commerce than any of the activities held validly taxed in the later cases. The Court stated:

> Though all of these cases were closely related to transportation in commerce both in time and movement, it will be noted that in each there can be distinguished a definite separation between the taxable event and the commerce itself.

Joseph v. Carter & Weekes Co., supra at 433.

The United States Supreme Court obviously views stevedoring as an integrated inseparable part of commerce by sea, and hence absolutely protected.

The appellant in the cause before us makes the argument that subsequent decisions of the United States Supreme Court have either impliedly overruled the stevedoring cases or eroded the principles upon which the result in those cases was reached. As authority for this argument, appellant cites some of the same cases presented by petitioners in *Carter & Weekes*, in support of the same theory. Appellant also cites more recent Supreme Court commerce clause dicisions, including *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 92 L. Ed. 1633, 68 S. Ct. 1260 (1948); *Interstate Oil Pipeline v. Stone*, 337 U.S. 662, 93 L. Ed. 1613, 69 S. Ct. 1264 (1949); *Canton R.R. v. Rogan*, 340 U.S. 511, 95 L. Ed. 488, 71 S. Ct. 447 (1951); *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 44 L. Ed. 2d 1, 95 S. Ct. 1538 (1975). A very recent import-export clause case is also cited,

Michelin Tire Corp. v. Wages, ... U.S. ..... 46 L. Ed. 2d 495, 96 S. Ct. ..... (1976).

We have examined carefully each of the cases cited by appellant, and others not cited. (*Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 95 L. Ed. 573, 71 S. Ct. 508 (1951), and *Michigan-Wisconsin Pipeline Co v. Calvert*, 347 U.S. 157, 98 L. Ed. 583, 74 S. Ct. 396 (1954).) We are of the opinion that the United States Supreme Court has not overruled its stevedoring decisions by implication, nor has there been any clear indication that the court would welcome the opportunity to do so

We are therefore persuaded that we must hold the tax invalid; we do so in recognition of our duty to abide by controlling United States Supreme Court decisions construing the federal constitution. Hence, we find it unnecessary to discuss the aforementioned cases beyond the fact that nowhere in them do we find language criticizing, expressly contradicting, or overruling (even impliedly) the stevedoring cases.

We have been constrained before by controlling United States Supreme Court decisions in this area. *See B. F. Goodrich v. State*, 38 Wn.2d 663, 231 P.2d 325, *cert denied*, 342 U.S. 876, 96 L. Ed. 659. 72 S. Ct. 167 (1951), where essentially the same arguments were raised as in this appeal, on the issue of whether the state violated the commerce clause by assessing a tax on Goodrich's activity. As here, a United States Supreme Court case was controlling. To ease our doubts about the required result, we stated in *Goodrich* on pages 674 and 676:

Whatever we may think of this distinction from the standpoint of practical effect, our only concern with it here is that it has been made and must be observed.

* * *

These questions, however, are by no means novel; they have often been raised, and the supreme court has often considered them, as an analysis of its cases will readily reveal. It scarcely needs be said that, with respect to matters involving the Federal constitution, we, as an inferior tribunal, must follow the pronouncements of that court no matter what our private views may be.

See also Tricon, Inc. v. King County, 60 Wn.2d 392, 374 P.2d 174, *cert. denied*, 372 U.S. 908, 9 L. Ed. 2d 717, 83 S. Ct. 721 (1962). The courts of the several states seem to be unanimous in their recognition of this obligation to follow controlling Supreme Court precedent on such matters.[1]

Fully mindful of our prior criticism of the principles and reasoning of the stevedore cases (*See Washington-Oregon Shippers Cooperative Ass'n, Inc. v. Schumacher*, 59 Wn.2d 159, 167, 367 P.2d 112,

[1]For example, the Indiana Supreme Court has said:

"Regardless of our personal opinion [illegible] both as to the law and the facts, we are bound, as a matter of [illegible] Court, under the oath we took to follow the Constitution of the United States, as interpreted by the Supreme Court of the United States, and that Court, in our opinion, has determined the issue in this case." *Cuffel v. State*, 247 Ind. 357, 215 N.E.2d 36, 37 (1966).

Accord, *Mealey v. Martin*, 468 P.2d 965, 966-67 (Alas. 1970); *Baldwin v. Arizona Flame Restaurant*, 313 P.2d 759, 764 (Ariz. 1957); *People v. Dorado*, 398 P.2d 361, 365-66, 372, 373 (Cal. 1965); *Belton v. Gebhart*, 91 A.2d 137, 141 (Del. 1952), *aff'd sub nom. Brown v. Board of Education*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955); *Looper v. Georgia, Southern & Florida R.R.*, 99 S.E.2d 101, 104 (Ga. 1957); *Cuffel v. State, supra*; *Trinkle v. Hand*, 337 P.2d 665, 667, 668 (Kan.), *cert. denied*, 361 U.S. 846, 80 S. Ct. 101, 4 L. Ed. 2d 85 (1959); *Glover v. Minneapolis Bldg. Trades Council*, 10 N.W.2d 481, 482, 484 (Minn. 1943); *Bourjois Sales Corp. v. Dorfman*, 7 N.E.2d 30 (N.Y. 1937). See generally C.J.S., Courts § 206.

115-16 (1961)), we must nevertheless hold the instant tax on stevedoring invalid.

The judgment of the trial court is affirmed.

We concur:

STAFFORD, J.
ROSELLINI, J.
HAMILTON, J.
WRIGHT, C.J.
BRACHTENBACH, J.
WIEHL, J.P.T.

No. 44140

UTTER, J. (dissenting)—I believe the stevedoring cases[1] upon which the majority relies have been impliedly overruled and are also distinguishable from the facts here presented. The United States Supreme Court in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 82 L. Ed. 823, 58 S. Ct. 546 (1938); *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 92 L. Ed. 1633, 68 S. Ct. 1260 (1948); *Interstate Oil Pipe Line Co. v. Stone*, 337 U.S. 662, 93 L. Ed. 1613, 69 S. Ct. 1264 (1949); *Canton R.R. v. Rogan*, 340 U.S. 511, 95 L. Ed. 488, 71 S. Ct. 447 (1951); *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 44 L. Ed. 2d 1, 95 S. Ct. 1538 (1975), has severely eroded the scope of the "direct-indirect" test enunciated in the stevedoring cases. In addition, the Supreme Court's inaction in the face of the question-

[1]*Puget Sound Stevedoring Co. v. Tax Comm'n*, 302 U.S. 90, 82 L. Ed. 68, 58 S. Ct. 72 (1937); *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422, 91 L. Ed. 993, 67 S. Ct. 815 (1947).

ing of the continued validity of the stevedoring cases in *Martin Ship Service Co. v. Los Angeles*, 34 Cal. 2d 793, 215 P.2d 24 (1950); *Washington-Oregon Shippers Coop. Ass'n, Inc. v. Schumacher*, 59 Wn.2d 159, 367 P.2d 112 (1961); *HC&D Moving & Storage Co. v. Yamane*, 48 Hawaii 486, 405 P.2d 382 (1965); raises further doubts as to the necessity of their use as mandatory precedent here.

The clause here at issue is the commerce clause[2] rather than the import-export clause.[3] A state generally has broader discretion in taxing activities than goods. *Canton R.R. v. Rogan, supra*. The commerce clause involves a grant of power to Congress, in the face of which a state may exercise its power so long as it does not negate the Union's ability to act. The import-export clause imposes the same limits as the commerce clause as well as depriving the states of the ability to levy an impost or duty on an export or import. *Michelin Tire Corp. v. Wages*, ... U.S. ....., 46 L. Ed. 2d 495, 96 S. Ct. ..... (1976).

The buiness and occupation tax, even though it reaches stevedoring activity, it not a tax on imports or an impost or duty on the activity of importing. Stevedores are not importers nor is stevedoring an

[2]U.S. Const. art. 1, § 8, reads in part:
"* * *
"To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;"

[3]U.S. Const. art. 1, § 10, reads in part:
"* * *
"No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress."

importing activity, for stevedores have no direct relationships to imports, but only to the process of importing and exporting. *Sea-Land Serv., Inc. v. County of Alameda*, 12 Cal. 3d 772, 528 P.2d 56, 117 Cal Rptr. 448 (1974); *Canton R.R. v. Rogan, supra*.

Stevedoring activity, while necessary to interstate commerce, is not in itself interstate commerce. All activity takes place locally, that is, wholly within this state, and involves the type of business for which the state affords protection. *Michelin Tire Corp. v. Wages, supra* at 505. This state's business and occupation tax is not selectively imposed. It is a general occupation tax and does not substantially impair or prohibit transportation. As such it does not violate the import-export clause.

Even if the loading and unloading of ships can be said to have interstate characteristics, the state may still levy a nondiscriminatory gross receipts tax if there is no multiple burden or regulation of commerce. A nondiscriminatory tax on interstate commerce is valid if it is apportioned and does not reach activities beyond the state's borders. *Canton R.R. v. Rogan, supra* at 515.

A tax which is not an impost or duty and therefore prohibited, or an act of direct regulation, such as a license, is a general tax and is not forbidden unless it is a regulation of commerce in disguise. *General Motors Corp. v. Washington*, 377 U.S. 436, 12 L. Ed. 2d 430, 84 S. Ct. 1564 (1964). The state can tax but cannot regulate commerce by any means.

Brown v. Maryland, 25 (12 Wheat.) 419, 448, 449, 6 L. Ed. 678 (1827). However, a general business and occupation tax is "not a licensing provision for the regulation of a business or calling, nor does it impose conditions prerequisite to engaging in business within the state." *Smith v. State*, 64 Wn.2d 323, 333, 391 P.2d 718 (1964).

There is no showing that this tax is offensive to the commerce clause and it should be upheld.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

REMITTITUR

No. 44140

Thurston County No. 51818

Court of Appeals No. 2204-II

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES, ET AL, *Respondents*,

v.

THE DEPARTMENT OF REVENUE, *Appellant*.

The State of Washington to: The Superior Court of the State of Washington in and for Thurston County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on February 3, 1977, became the final judgment of this court in the above entitled case on March 7, 1977. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

$392.73 in favor of respondents and against appellant.

APPENDIX C

82.04.220 Business and occupation tax imposed. There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

82.04.290 Tax on other business or service aetivities. Upon every person engaging within this state in any business activity other than or in addition to those enumerated in RCW 82.04.230, 82.04.240, 82.04.250, 82.04.255, 82.04.260, 82.04.270, 82.04.275 and 82.04.280; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one percent. This section includes, among others, and without limiting the scope hereof (whether or not title to materials used in the performance of such business passes to another by accession, confusion, or other than by outright sale), persons engaged in the business of rendering any type of service which does not constitute a "sale at retail" or a "sale at wholesale." The value of advertising, demonstration, and promotaional supplies and materials furnished to an agent by his principal or supplier to be used for informational, educational and promotional purposes shall not be considered a part of the agent's remuneration or commission and shall not be subject to taxation under this section.

APPENDIX D

STATE OF WASHINGTON
DEPARTMENT OF REVENUE
Olympia, Washington

WAC 458-20-193D (Rule 193—Part D)
TRANSPORTATION, COMMUNICATION,
PUBLIC UTILITY ACTIVITIES, OR
OTHER SERVICES IN INTERSTATE
OR FOREIGN COMMERCE

Rule 193 deals with interstate and foreign commerce and is published in four separate parts:

Part A. Sales of Goods Originating in Washington to Persons in Other States.

Part B. Sales of Goods Originating in Other States to Persons in Washington.

Part C. Imports and Exports: Sales of Goods from or to Persons in Foreign Countries.

Part D. Transportation, Communication, Public Utility Activities, or Other Services in Interstate or Foreign Commerce.

PART D.

BUSINESS AND OCCUPATION TAX,
PUBLIC UTILITY TAX

In computing tax there may be deducted from gross income the amount thereof derived as compensation for performance of services which in themselves constitute interstate or foreign commerce to

the extent that a tax measured thereby constitutes an impermissible burden upon such commerce. A tax does not constitute an impermissible burden upon interstate or foreign commerce unless the tax discriminates against that commerce by placing a burden thereon that is not borne by intrastate commerce, or unless the tax subjects the activity to the risk of repeated exactions of the same nature from other states. Transporting across the state's boundaries is exempt, whereas supplying such transporters with facilities, arranging accommodations, providing funds and the like, by which they engage in such commerce is taxable.

EXAMPLES OF EXEMPT INCOME:

1. Income from those activities which consist of the actual transportation of persons or property across the state's boundaries is exempt.
2. That portion of commissions received by local brokers or commission merchants for interstate or foreign sales which was paid to out-of-state independent agents is exempt.
3. Income from services rendered by an out-of-state branch or office of the taxpayer regularly maintained outside the state is exempt. (See Rule 194.)

EXAMPLES OF TAXABLE INCOME:

1. Compensation received by persons engaged in business within this state for performance

of business activities which are only ancillary to transportation across the state's boundaries is taxable.

2. Compensation received by merchandise brokers or commission merchants for services rendered within this state to principals engaged in interstate or foreign commerce is taxable.
3. Compensation received by contracting, stevedoring or loading companies for services performed within this state is taxable.

In computing public utility tax, there may be deducted from gross income so much thereof as is derived from actually transporting persons or property or transmitting communications or electrical energy, from this state to another state or territory or to a foreign country and vice versa.

Persons, including dock companies or wharfage companies, are permitted no deduction of gross income from services performed in this state consisting of the handling of cargo or freight even though such cargo or freight has moved or will move across the state's boundaries.

No deduction is permitted with respect to gross income derived from activities which are ancillary to transportation across the state's boundaries, such as income received by a wharf company or warehouse company for the storage of goods. The mere ownership or operation of facilities by means of which others engage in foreign or interstate commerce is

an activity ancillary to such commerce and any income received therefrom is taxable.

Insofar as the transportation of goods is concerned, the interstate movement of cargo or freight ceases when the goods have arrived at the destination to which it was billed by the out-of-state shipper, and no deduction is permitted of the gross income derived from transporting the same from such point of destination in this state to another point within this state. Thus, freight is billed from San Francisco, or a foreign point, to Seattle. After arrival in Seattle it is transported to Spokane. No deduction is permitted of the gross income received for the transportation from Seattle to Spokane. Again, freight is billed from San Francisco, or a foreign point, to a line carrier's terminal, or a public warehouse in Seattle. After arrival in Seattle it is transported from the line carrier's terminal or public warehouse to the buyer's place of business in Seattle. No deduction is permitted of the gross income received as transportation charges from the line carrier's terminal or public warehouse to the buyer's place of business in Seattle.

Revised May 3, 1974.

APPENDIX E

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. 51818

PETITION FOR DECLARATORY JUDGMENT ON VALIDITY OF RULE

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES AND THE WASHINGTON PUBLIC PORTS ASSOCIATION,

Petitioners,

vs.

THE DEPARTMENT OF REVENUE,

Respondents.

Petitioners state as follows:

I.

The Association of Washington Stevedoring Companies is an unincorporated association of private companies engaged in the stevedoring business. The Washington Public Ports Association is a nonprofit corporation having a membership consisting of certain port authorities in the State of Washington that engage in stevedoring activities.

II.

The Department of Revenue has been established by law as a department of Washington State government. Its chief executive officer has been designated the Director of Revenue.

III.

The Director, acting through the Department, is authorized and directed to make, adopt and publish such rules and regulations as he may deem necessary or desirable to carry out the powers and duties imposed upon him (or the Department) by the legislature.

IV.

The predecessor of the Department was the Tax Commission of the State of Washington. The Tax Commission, after the enactment of the Business and Occupation Tax (Chapter 180, Laws of 1935), adopted its Rule 198 making the tax applicable to compensation received by a stevedoring company for loading and unloading vessels engaged in interstate commerce. That rule remained in effect until the decision by the United States Supreme Court in *Puget Sound Stevedoring Co. v. State Tax Commission*, 302 U.S. 90, 82 L. ed. 68 (1937), which held the tax on the stevedoring activities there in issue unconstitutional. The Tax Commission's rules and regulations, as revised May 1, 1939, reflected a change in the rule to exclude from the Business and Occupation Tax compensation received by a contracting stevedoring company for loading and unloading cargo from vessels where such cargo is moving in interstate or foreign commerce and where the work is actually directed and controlled by the stevedoring company. The rule thereafter remained substantially the same until May 3, 1974.

V.

On May 3, 1974, the Department adopted its revised Rule 193-D providing in part:

> "3. Compensation received by contracting, stevedoring or loading companies for services performed within this state is taxable".

The Business and Occupation Tax law under which the revised rule was adopted remains the same as the law at issue in *Puget Sound Stevedoring, supra.*

VI.

The private stevedoring companies that constitute the petitioner Association of Washington Stevedoring Companies, are engaged in the same stevedoring activities that were held not taxable in *Puget Sound Stevedoring Co. v. State Tax Commission, supra.* Many of the port authority members of the petitioner Washington Public Ports Association are also engaged in such activity. Accordingly, the threatened application of the Department's revised Rule 193-D confers on petitioners standing to bring this action pursuant to RCW 34.04.070.

VII.

The Department's revised Rule 193-D is invalid because it violates the commerce clause, Article I, Section 8, of the United States Constitution (empowering Congress to regulate commerce with foreign nations and among the several states). The rule is also invalid to the extent that it affects foreign commerce covered by the import-export clause contained in Article I, Section 10 of the United States Constitution.

WHEREFORE, petitioners pray for a judgment declaring the Department's revised Rule 193-D invalid as violating the aforesaid clauses of the United States Constitution, and for such other relief as may seem proper.

BOGLE & GATES

JOHN T. PIPER
Attorneys for Petitioners

APPENDIX F

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF THURSTON

No. 51818

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES AND THE WASHINGTON PUBLIC PORTS ASSOCIATION,

Petitioners,

vs.

THE DEPARTMENT OF REVENUE,

Respondent.

ORAL DECISION OF THE COURT

(June 26, 1975)

THE COURT: As both of you gentlemen have pointed out in your briefs, the Court is placed in a very awkward position concerning a determination of this matter. First of all, I think that I should comment that Judge Henry in his case, as has been pointed out by Mr. Hicks, was able to draw a distinction, and therefore he as well as the appellate courts of which Mr. Hicks mentions were able to dodge the bullet of ruling specifically on the basic cases here in question. Contrary thereto this Court is faced head on with Puget Sound and Carter and Weekes cases.

It would seem to the Court in light of the cases which have been argued and so thoroughly briefed that there certainly is a swing away from the Puget

Sound and Carter and Weekes cases. We are here involved primarily with the Interstate Commerce clause and the import/export clause. It is true, as counsel for the petitioners advocates, that the cases cited which would infer meaning contrary to the basic cases are not stevedoring cases, and it is true, further, as he has pointed out, that the stevedoring cases involve transportation, and the primary case of Western Livestock did not so involve but involved a type of sales operation. Western Livestock is perhaps the first indication of a break from the Puget Sound and Carter and Weekes cases. It is likewise true, as counsel for petitioners sets forth, that we do have a yearly chronology of the opinions of the court, and from Puget Sound and Carter and Weekes up and through Spector we find in those opinions of the intermediate cases the theory which would seem to be adverse to the basic cases.

It is difficult for this Court to compare these cases and come up with any true answer, and to analyze them would indicate the swing of which the State proposes. The argument concerning goods and activities, goods as distinguished from activities, that activities under the specific Constitutional provisions seem to be losing their protection as compared to goods themselves is certainly obvious. The one difficulty the Court sees is in the Puget Sound and Carter and Weekes cases, that is, they're specifically stating that stevedoring is a part of interstate commerce as distinguished from intrastate or local

activity, as the State makes clear, and I assume that this must be upon the basis that the burden by state imposition of tax in its orderly continuity of interstate commerce would be such that stevedoring must be a part thereof.

Now, it goes without saying that the theory of the cases, with the fact that the stevedoring in this case is merely loading and unloading by local employees, the complete activity being local in nature, is difficult to analyze in relation to Puget Sound and Carter and Weekes. The second argument that has emerged from the succession of cases, of course, is the argument over regulation, and it is true that there have been distinctions made in that regard as to whether or not there is a sufficient regulation to negate the tax, or if we create a situation where the necessary taxable conditions are met that it would be taxable whether it be intra or interstate. Then, of course, we have the theory through the cases of the right of apportionment, as is true in the New York case and Michigan case.

Now, Mr. Hicks would have the Court say that I must take this as a case of first impression, the case before the Court, and the Court would have to conclude that through the years and based upon the arguments of the State of Washington if I were to take this case as one of first impression it would be relatively easy for this Court to find in light of the cases cited that the State of Washington would have the right to tax by way of B&O, it being a local

activity, it being not a regulation, or if we wish to use the apportionment approach that that likewise perhaps could be applicable in theory. Of course, we don't have that problem at this time under the facts. I only indicate that the new approach, as is pointed out by the State, certainly would seem to be logical and of a more modern tendency.

The Court also notes the attitude of the strong minority in these cases, and perhaps the attitude of the professional experts, as well as the tendency of the various state courts to veer from meeting the issue of Puget Sound and Carter and Weekes head on. As has been pointed out, we reach a very fine line in this determination. The Court has examined the Smith case here in our State, and also, of course, the cases in issue, and this Court might feel if it were a case of first impression that it would have the right and privilege as a trial court to make a proper, reasonable, logical conclusion as a result thereof. It sticks in this Court's mind, however, that there has to be a reason, of which is beyond the ability of this Court to comprehend, that everyone has shied from the stevedoring cases, and many minds obviously more brilliant than mine have not been able to overturn those cases directly in thirty-eight years, and it seems to this Court that there must be a good reason therefor, as per the opinions of the members of our Supreme Court of the United States at that time as they pertained to those facts. The fact of the matter is the Supreme Court since those initial cases has not determined and has not found nor declared that steve-

doring activity such as we have before the Court is local activity, and the Court must conclude then in light of that factor it still is a part of the continuous flow of interstate commerce under the Interstate Commerce clause. It stands out like a sore thumb. And I would be inclined to agree as the years have gone by that the factual suitations that exist now are different than they were then to the extent that the so-called new approach would seem more practical and more reasonable. The duty of the Superior Court of this County in relation to the decision of the Supreme Court of the United States is such that it is difficult for me to become Caesar.

Now, the State argues that based upon the flurry of cases which have occurred that thereby there has been a reversal of those basic cases of Puget Sound and Carter and Weekes by implication, and if I don't have the right to do it by implication then the Supreme Court of the State of Washington has indicated in its attitude that it is sufficient for me to find an invitation to overturn a case of the United States Supreme Court of which they at least have not specifically so stated except by other opinions subsequent in time. Well, I believe it goes without saying that I don't believe the Supreme Court perhaps can dictate to me anymore than they would be in the same position as it relates to a decision of the United States Supreme Court. I can only comment in that regard that if the State Supreme Court wishes in their wisdom, being nine in number, that is, desires to tackle the situation so that it is again confronting

the United States Supreme Court, they certainly may be my guest, but I do not find that just on the basis of the history of the cases, when there in fact has been no overturning of the Puget Sound and Carter and Weekes cases, that I can find I have the right to overrule those cases based upon implication, nor can I find that the Supreme Court's decisions actually in fact indicate an invitation to do so, because the Smith case does not specifically say that it is bad law, it only indicates that as to that particular case, well, they didn't say "apply" but Justice Finley's use of words was not proper as they applied to the Court's feeling as such.

It goes without saying, as all counsel realize, that the issue here is a head-on confrontation with cases of which are still the law of the land. I can find no invitation, I can find no implication of which would necessitate this Court in making a different ruling, or in fact legally being able to do so. And I want it understood that the Court in no way is attempting to dodge a bullet. We know that this is going to be a test case as it progresses through the various Appellate Courts, and I think rightfully so, but I do not believe this Court has the authority to join in an academic yo-yo and come up with a number of pearls of wisdom of which in either event would not be anything but lost in the shuffle as we progress through the various Appellate Courts to the Supreme Court of the United States.

Under those circumstances the Court does hold that the Puget Sound and Carter and Weekes cases

are the law of the land, as exemplified by those decisions; that they have not been reversed by implication, nor has there been an invitation to anyone to reverse those cases. I would agree with counsel for the petitioner that if that is to be done they should do it at such time as the proper determinations could be made accordingly.

This in no way reflects what this Court might do if this were a case of first impression, but the Court is bound by the decision of the United States.

I will sign the appropriate pleadings in accordance therewith.

CERTIFICATE

STATE OF WASHINGTON }
COUNTY OF THURSTON } ss.

I, GENE BARKER, an Official Court Reporter of the State of Washington, do hereby certify that the foregoing transcript of the Oral Decision of the Court, presented in the above-entitled and numbered Cause by the Honorable FRANK E. BAKER, Judge of the Superior Court of the State of Washington, in and for the County of Thurston, on the 26th day of June, 1975, was reported by me on said date and reduced to typewriting under my direction.

I further certify that said transcript of the Oral Decision of the Court, as above transcribed, is a full, true and correct transcript of the machine shorthand notes of the aforementioned matter.

DATED AND SIGNED this ..... day of August, 1975.

.....

Official Court Reporter

APPENDIX G

Assignments of error

The trial court erred in entering its judgment of November 24, 1975 declaring the Department of Revenue Rule 193D invalid and unconstitutional.

Issues pertaining to assignments of error

Is the business activity of loading and unloading at a local pier ships, which ply interstate and foreign commerce, subject to a state's general business and occupation tax?

Supreme Court, U. S.
FILED
NOV 17 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1706

THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON,

Petitioner,

—V.—

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR CERTIORARI FILED JUNE 1, 1977
CERTIORARI GRANTED OCTOBER 3, 1977

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1706

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CERTIORARI GRANTED OCTOBER 3, 1977

APPENDIX

Attorneys for Petitioner:

SLADE GORTON
Attorney General, State of Washington
RICHARD H. HOLMQUIST
Senior Assistant Attorney General
MATTHEW J. COYLE
Assistant Attorney General

Temple of Justice
Olympia, Washington 98504
Telephone: (206) 753-5528

Attorneys for Respondents:

JOHN T. PIPER, ESQ.
MAX KAMINOFF, ESQ.
D. MICHAEL YOUNG, ESQ.
BOGLE & GATES

The Bank of California Center
Seattle, Washington 98164
Telephone: (206) 682-5151

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Opinion of Washington Supreme Court	App. A to Petition for Writ of Certiorari
Remittitur of Washington Supreme Court	App. B to Petition for Writ of Certiorari

RELEVANT DOCKET ENTRIES

Title of Case:

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March 13, 1975	Petitioners' Brief in Support of Motion for Judgment on the Pleadings	
April 21, 1975	Respondent's Memorandum on Motion for Judgment on the Pleadings	
June 24, 1975	Reply Brief of Petitioners in Support of Motion for Judgment on the Pleadings.	
June 26, 1975	Argument to and Oral Decision by Thurston County Superior Court, Hon. Frank E. Baker, Judge	8
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March 29, 1976	Brief of Appellant	
April 29, 1976	Brief of Respondents	
September 22, 1976	Appellant's Reply Brief ...	
October 4, 1976	Oral Argument Before Supreme Court of Washington	
1977		
February 3, 1977	Opinion of Supreme Court of Washington Filed ...	App. A to Petition for Writ of Cert.
March 7, 1977	Remittitur of Supreme Court of Washington ...	App. B to Petition for Writ of Cert.
June 1, 1977	Petition for Writ of Certiorari to the Supreme Court of the State of Washington	
July 15, 1977	Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of Washington.	
October 3, 1977	Order Granting Petition for Writ of Certiorari to the Supreme Court of the State of Washington	

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. 51818

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BOGLE & GATES
JOHN T. PIPER
Attorneys for Petitioners

DATED: January 27, 1975

[Affidavit of Service omitted in printing]

IN THE SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES and WASHINGTON PUBLIC PORTS ASSOCIATION, *Petitioners,* vs. THE DEPARTMENT OF REVENUE, *Respondent.*	No. 51818 ANSWER

The Respondent admits Paragraphs I, II, III, IV, V, and VI and denies Paragraph VII of Petitioners' Petition for Declaratory Judgment.

DATED this 13th day of February, 1975.

SLADE GORTON
Attorney General
RICHARD D. HICKS
Assistant Attorney General
Attorneys for Respondent.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF THURSTON

No. 51818

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES AND THE WASHINGTON PUBLIC PORTS ASSOCIATION,

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The Court also notes the attitude of the strong minority in these cases, and perhaps the attitude of the professional experts, as well as the tendency of the various state courts to veer from meeting the issue of Puget Sound and Carter and Weekes head on. As has been pointed out, we reach a very fine line in this determination. The Court has examined the Smith case here in our State, and also, of course, the cases in issue, and this Court might feel if it were a case of first impression that it would have the right and privilege as a trial court to make a proper, reasonable, logical conclusion as a result thereof. It sticks in this Court's mind, however, that there has to be a reason, of which is beyond the ability of this Court to comprehend, that everyone has shied from the stevedoring cases, and many minds obviously more brilliant than mine have not been able to overturn those cases directly in thirty-eight years, and it seems to this Court that there must be a good reason therefor, as per the opinions of the members of our Supreme Court of the United States at that time as they pertained to those facts. The fact of the matter is the Supreme Court since those initial cases has not determined and has not found nor declared that stevedoring activity such as we have before the Court is local activity, and the Court must conclude then

in light of that factor it still is a part of the continuous flow of interstate commerce under the Interstate Commerce clause. It stands out like a sore thumb. And I would be inclined to agree as the years have gone by that the factual situations that exist now are different than they were then to the extent that the so-called new approach would seem more practical and more reasonable. The duty of the Superior Court of this County in relation to the decision of the Supreme Court of the United States is such that it is difficult for me to become Caesar.

Now, the State argues that based upon the flurry of cases which have occurred that thereby there has been a reversal of those basic cases of Puget Sound and Carter and Weekes by implication, and if I don't have the right to do it by implication then the Supreme Court of the State of Washington has indicated in its attitude that it is sufficient for me to find an invitation to overturn a case of the United States Supreme Court of which they at least have not specifically so stated except by other opinions subsequent in time. Well, I believe it goes without saying that I don't believe the Supreme Court perhaps can dictate to me anymore than they would be in the same position as it relates to a decision of the United States Supreme Court. I can only comment in that regard that if the State Supreme Court wishes in their wisdom, being nine in number, that is, desires to tackle the situation so that it is again confronting the United States Supreme Court, they certainly may be my guest, but I do not find that just on the basis

of the history of the cases, when there in fact has been no overturning of the Puget Sound and Carter and Weekes cases, that I can find I have the right to overrule those cases based upon implication, nor can I find that the Supreme Court's decisions actually in fact indicate an invitation to do so, because the Smith case does not specifically say that it is bad law, it only indicates that as to that particular case, well, they didn't say "apply" but Justice Finley's use of words was not proper as they applied to the Court's feeling as such.

It goes without saying, as all counsel realize, that the issue here is a head-on confrontation with cases of which are still the law of the land. I can find no invitation, I can find no implication of which would necessitate this Court in making a different ruling, or in fact legally being able to do so. And I want it understood that the Court in no way is attempting to dodge a bullet. We know that this is going to be a test case as it progresses through the various Appellate Courts, and I think rightfully so, but I do not believe this Court has the authority to join in an academic yo-yo and come up with a number of pearls of wisdom of which in either event would not be anything but lost in the shuffle as we progress through the various Appellate Courts to the Supreme Court of the United States.

Under those circumstances the Court does hold that the Puget Sound and Carter and Weekes cases are the law of the land, as exemplified by those decisions; that they have not been reversed by implica-

tion, nor has there been an invitation to anyone to reverse those cases. I would agree with counsel for the petitioner that if that is to be done they should do it at such time as the proper determinations could be made accordingly.

This in no way reflects what this Court might do if this were a case of first impression, but the Court is bound by the decision of the United States.

I will sign the appropriate pleadings in accordance therewith.

CERTIFICATE

STATE OF WASHINGTON }
COUNTY OF THURSTON } ss.

I, GENE BARKER, an Official Court Reporter of the State of Washington, do hereby certify that the foregoing transcript of the Oral Decision of the Court, presented in the above-entitled and numbered Cause by the Honorable FRANK E. BAKER, Judge of the Superior Court of the State of Washington, in and for the County of Thurston, on the 26th day of June, 1975, was reported by me on said date and reduced to typewriting under my direction.

I further certify that said transcript of the Oral Decision of the Court, as above transcribed, is a full, true and correct transcript of the machine shorthand notes of the aforementioned matter.

DATED AND SIGNED this..... day of August, 1975.

.....
Official Court Reporter

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. 51818

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES AND WASHINGTON PUBLIC PORTS ASSOCIATION,

Petitioners,

vs.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER having come on before the undersigned Judge of the above-entitled Court on cross motions for judgment on the pleadings by Petitioners and Respondent, and the Court having considered the pleadings and written and oral arguments of the parties,

NOW, THEREFORE, the Court makes the following

FINDINGS OF ADMITTED FACT

Respondent, by its answer, has admitted certain allegations of the petition which are as follows:

1. The Association of Washington Stevedoring Companies is an unincorporated association of private companies engaged in the business of stevedoring. The Washington Public Ports Association is a

nonprofit corporation having a membership consisting of certain port authorities in the State of Washington that engage in stevedoring.

2. The Department of Revenue has been established by law as a department of Washington State government. Its chief executive officer has been designated the Director of Revenue.

3. The Director, acting through the Department, is authorized and directed to make, adopt and publish such rules and regulations as he may deem necessary or desirable to carry out the powers and duties imposed upon him (or the Department) by the legislature.

4. The predecessor of the Department was the Tax Commission of the State of Washington. The Tax Commission, after the enactment of the Business and Occupation Tax (Chapter 180, Laws of 1935), adopted its Rule 198 making the tax expressly applicable to compensation received by a stevedoring company. The attempted implementation of that rule led to the decision by the United States Supreme Court in *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90, 82 L. ed 68 (1937), which held the tax on stevedoring activities serving vessels engaged exclusively in interstate or foreign commerce to be unconstitutional. The Tax Commission's rule was thereafter changed to exclude from the Business and Occupation Tax compensation received by a contracting stevedoring company for loading and unloading cargo from ves-

sels where such cargo is moving in interstate or foreign commerce and where the work is actually directed and controlled by the stevedoring company. The rule remained substantially the same until May 3, 1974.

5. On May 3, 1974, the Department adopted its revised Rule 193-D providing in part:

> "3. Compensation received by contracting, stevedoring or loading companies for services performed within this state is taxable".

The Business and Occupation Tax law under which the revised rule was adopted remains the same as the law at issue in *Puget Sound Stevedoring Co., supra.*

6. The private stevedoring companies that constitute the petitioner, Association of Washington Stevedoring Companies, are engaged in the same stevedoring activities that were held not taxable in *Puget Sound Stevedoring Co., supra.* Many of the members of petitioner, Washington Public Ports Association, are also engaged in such activities. Accordingly, the application of the Department's revised Rule 193-D confers on petitioners standing to bring this action pursuant to RCW 34.04.070.

Based upon the foregoing admitted facts, the Court makes the following

CONCLUSIONS OF LAW

1. The United States Supreme Court cases of *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 and *Joseph v. Carter & Weekes Co.*, 330

U.S. 422, are the law of the land and have not been reversed expressly or by implication, nor has there been any invitation from the Supreme Court to reverse such cases.

2. The Department's revised Rule 193-D is invalid to the extent it relates to compensation derived by stevedoring or loading companies for loading cargo on, and unloading cargo from, vessels where such cargo is moving in interstate or foreign commerce and where the work is directed and controlled by the stevedoring or loading company because the revised rule, to that extent, violates "the commerce clause" (in Article I, Section 8) and "the import-export clause" (in Article I, Section 10) of the United States Constitution.

DATED this 24th day of November, 1975.

/s/ Frank E. Baker
Judge

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

No. 51818

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES AND WASHINGTON PUBLIC PORTS ASSOCIATION,

Petitioners,

vs.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Respondent.

JUDGMENT DECLARING DEPARTMENT OF REVENUE RULE INVALID

Based upon the Findings of Admitted Fact and Conclusions of Law made and entered in this matter, it is hereby

ORDERED, ADJUDGED AND DECREED that the Department's revised Rule 193-D is invalid to the extent it relates to compensation derived by stevedoring or loading companies for loading cargo on, and unloading cargo from, vessels where such cargo is moving in interstate or foreign commerce and where the work is directed and controlled by the stevedoring or loading company because the revised rule, to that extent, violates "the commerce clause" (in Article I, Section 8) and "the import-export clause" (in Article I, Section 10) of the United States Constitution.

DATED this 24th day of November, 1975.

/s/ Frank E Baker
Judge

Supreme Court, U. S.
FILED
JUL 15 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 76-1706

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES, et al.,
Respondents,

v.

THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON,
Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN T. PIPER
BOGLE & GATES
The Bank of California Center
Seattle, Washington 98164

Counsel for Respondents

CRAFTSMAN PRESS — WORD PROCESSING, SEATTLE

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BRIEF IN OPPOSITION TO
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OF WASHINGTON

QUESTIONS PRESENTED

1. Is the decision below, which is based on decisions of this Court that are squarely in point, a correct decision?

2. Does a regulation of petitioner that exempts from tax "transportation of persons or property across state boundaries" provide an adequate factual base for petitioner's request that this Court "clarify" state power to tax those very activities?

RESPONDENTS' STATEMENT OF THE CASE

Promptly after enacting its doing-business privilege tax in 1935, petitioner ("the State") attempted to apply it to stevedoring activities in interstate and foreign commerce. Stevedoring activities were expressly made taxable in a regulation. The State's attempt was struck down by this Court in Puget Sound Stevedoring Co. v. Tax Commission, 302 U.S. 90 (1937). (Petitioner's Brief for Certiorari at 26, Appendix E, ¶ IV). Ten years after Puget Sound, this Court followed that case in Joseph v. Carter & Weekes Co., 330 U.S. 422 (1947), another stevedoring case involving a privilege tax indistinguishable from the Washington tax. Both the Import-Export Clause and the Commerce Clause were invoked.

For 37 years, succeeding editions of the State's regulation acquiesced in Puget Sound. In 1974, however, an amended regulation reasserted the tax against stevedoring activities conceded to be identical to those protected by Puget Sound. (Petitioner's Brief for Certiorari at 3, n. 5). Puget Sound defined the protected activities as: "Unloading vessels by moving the cargo from ship's hold to 'first place of rest' on the dock; and loading vessels by moving the cargo from place of rest to ship's hold." 302 U.S. at 93. This

Court considered the stevedores as an arm of the foreign and interstate carrier -- doing work (historically done by the ship's crew) that is an integral part of foreign and interstate ocean transportation.

REASONS WHY PETITION SHOULD NOT BE GRANTED

I. The Decision Below Was Correct

The court below followed a settled rule twice established by this Court in stevedoring decisions that are squarely in point. Puget Sound Stevedoring Co. v. Tax Commission, supra, and Joseph v. Carter & Weekes Co., supra. See also Michigan-Wisconsin Pipeline Co. v. Calvert, 347 U.S. 157 (1954), which is indistinguishable in principle. The State asks this Court to consider precisely the narrow issue decided in those cases yet a third time. This Court, in Puget Sound, treated the stevedores as an arm of the foreign and interstate ocean carriers and in so doing was consistent with maritime common law,[1] federal statutes[2] and international

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[1] "'[I]t is as much the duty of the shipowner to load and discharge the cargo as it is to carry it between the loading and discharging ports.'" Union Marine & Gen. Ins. Co. v. American Export Lines, Inc., 274 F. Supp. 123, 128 (S.D.N.Y.

agreements[3] governing the carriage of goods by sea. Any other rule would permit every state (and each political subdivision) controlling a seaport to effectively impose duties on international trade (because, although the excise may be imposed on the stevedore, his role as arm of the carrier means the tax will be passed on to the shipper as an item of overhead).

1966), quoting Munson S.S. Line v. Glasgow Nav. Co., 235 F. 64 (2d Cir. 1916), cert. denied, 243 U.S. 643 (1917), appeal dismissed, 246 U.S. 647 (1918). See also Ex parte Easton, 95 U.S. 68, 75-76 (1877); The Eddy, 72 U.S. (5 Wall.) 481, 495 (1867); Calcot, Ltd. v. Isbrandtson Co., 318 F.2d 669, 673 (1st Cir. 1963); American President Lines, Ltd. v. Federal Maritime Bd., 317 F.2d 887, 888 (D.C. Cir. 1962).

[2] The Carriage of Goods by Sea Act, 46 U.S.C. § 1303 (1970), governing foreign commerce, defining carrier responsibility (and liability) provides in pertinent part:

> "(2) The carrier shall properly and faithfully load, handle, stow, carry, keep, care for, and discharge the goods carried."

Accord, the Harter Act, 46 U.S.C. § 190 (1970), governing interstate and foreign maritime commerce.

[3] Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea, June 23, 1925, 51 Stat. 233 (1937), T.S. No. 931, art. 3, §§ 2 & 8.

II. The Cases Relied Upon by the State Are Not In Point

The State relies on Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976), and Complete Auto Transit, Inc. v. Brady, 97 S. Ct. 1076 (1977).

Michelin involved a property tax, not an excise. It held that after the completion of import, tires which the importer continued to hold were subject to a property tax. (Previously goods were protected from property taxes as long as the importer held them in the "original package.")

Michelin says nothing at all about exporting and, even as to importing, Michelin's impact occurred after completion of the transit. This Court, in distinguishing the property tax involved in Michelin from a tax on importing, said: "In effect, the Clause was fashioned to prevent the imposition of exactions which were no more than transit fees . . . ." 423 U.S. at 290. Because stevedoring is a part of the "transit" activity (the cost of which is borne by the shipper), no more effective means of imposing "transit fees" on international trade could be found than an excise on stevedoring.

Complete Auto Transit did not involve the Import-Export Clause. As to the Commerce Clause, it was decided by this Court consistently with

earlier cases involving similar facts.[4] Interstate Oil Pipeline Co. v. Stone, 337 U.S. 662 (1949), and Canton Railroad v. Rogan, 340 U.S. 511 (1951). All three cases held taxable the activities of intrastate carriers -- both termini being within the taxing jurisdiction -- that operated independently of interstate carriers but happened to carry interstate goods. Foreign and interstate carriers were not involved in those cases -- whereas this Court and Congress have recognized that stevedores function as an arm of foreign and interstate carriers.

---

[4] Probably the significance that the state sees in Complete Auto Transit is not in its facts, but in some of its language. Because the result of that case accords with established precedent, the language would be dictum were it not that Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951) is declared overruled. The Court might alternatively have distinguished Spector as involving, in substance, a net income tax--ineptly labeled as an excise by the taxing jurisdiction.

III. The Record Below Is Inadequate for the Ambitious Demands That the State Makes Upon This Court

The State has shifted its ground since promulgating the regulation amendment that the court below struck down. The amendment put in issue only stevedoring activities -- a narrow band of commerce only yards wide (from point of rest on the dock to the ship's hold) -- and uniquely bound up with foreign trade, maritime law, and international agreements.

On brief, however, the State urges that this case be used to "complete the process of clarifying the scope of state taxing power which [this Court] commenced in Michelin Tire, supra, and Complete Auto Transit, supra." (Petitioner's Brief for Certiorari at 6).

But the State has not provided the right vehicle. The State's regulation expressly exempts interstate and foreign transport from tax, i.e., "the actual transportation of persons or property across state boundaries is exempt." (Petitioner's Brief for Certiorari at 22, Appendix D). In short, the State has not attempted an exercise of the taxing power that it asks this Court to "clarify." Its amendment did not attempt a tax on foreign and interstate commerce, but aimed only at reclassifying stevedoring as separate and intrastate.

Facts are surely the heart of the judicial craft. A narrow and unique band of sea commerce is not adequate for the broad, general task of "clarifying the scope of state taxing power" under not merely one, but two major clauses of the Constitution (the Import-Export Clause and the Commerce Clause).

Movement is so fundamental to commerce that it has received special protection. Goods moving in commerce are protected from the start of the journey to its end -- as long as there is no unnecessary interruption or delay in journey -- no matter how deeply a state may be penetrated or how many carriers may be involved. Champlain Realty Co. v. Brattleboro, 260 U.S. 366 (1922); Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469 (1926); Carson Petroleum Co. v. Vial, 279 U.S. 95 (1929); Minnesota v. Blasius, 290 U.S. 1 (1933). Almost as broad as the protection for the goods has been protection from excises on the activity of moving goods (or persons) in commerce. That protection has covered movement of goods between the points where the responsibility of the interstate carrier begins and ends. Michigan-Wisconsin Pipeline Co. v. Calvert, 347 U.S. 157 (1954). (Contrast Complete Auto Transit,

Inc. v. Brady, Interstate Oil Pipeline Co. v. Stone, and Canton Railroad v. Rogan, supra, and like cases involving intrastate carriers providing an independent movement and having both termini within the taxing jurisdiction.) Such protection is over 100 years old, having begun with the Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1873), and is supported by numerous cases decided since then.

If all this protection were to be totally and irrevocably swept away, as the State asks, the facts of the case should adequately raise the issues to be decided. A regulation that exempts the very commerce that the State asserts is taxable does not provide the factual base for such monumental judicial pronouncements.

An additional consideration is the nature of the excise. It is the most potent and dangerous weapon in the tax collector's arsenal. It can attach to activities of all kinds. The excise lacks the built-in political restraints that apply to property and income taxes which, if not required to be uniform, at least tend to be general to individuals or corporations that populate the taxing jurisdiction. The versatility of the excise makes it, in practice, virtually

immune to charges of discrimination.[5] A taxing authority's license in selecting subjects and rates for various excises renders a rule against multiple imposition (requiring apportionment)

[5] Washington, for example, has more than a dozen different tax rates for the privilege of doing business ranging from 3.6% of gross income (applicable to railroad, water, light and power distribution, telephone and telegraph) down to a mere .01% (applicable to wholesalers of grains and dried peas). RCW 82.04.230-290. This Court, in Magnano Co. v. Hamilton, 292 U.S. 40 (1933), permitted Washington to tax butter substitutes reasoning that the obvious differences between butter and oleo margarine were enough to support separate tax classifications. Following this Court's lead, the Washington court has explained, "There is no constitutional limitation upon the selection by the legislature of the subjects for excise tax so long as there is any reasonable basis for the classification whatsoever." Gruen v. State Tax Comm'r, 35 Wn.2d 1, 32, 211 P.2d 651, 669 (1949). More recently a tax on the operation of such recreational activities as golf, skating, skiing, pool and billiards has been approved while bowling was exempted. Hemphill v. Tax Comm'n, 65 Wn.2d 889, 400 P.2d 297 (1965). Even in interstate commerce the rule against discrimination has been effective mainly to curb legislation aimed at out-of-state drummers (see, e.g., Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887); Nippert v. Richmond, 327 U.S. 416 (1946)); and has not necessarily been effective even for that purpose. See Dunbar-Stanley Studios, Inc. v. Alabama, 393 U.S. 537 (1969), where this Court upheld a tax on transient photographers.

likewise impotent. For these reasons, a hundred years of judicial wisdom has restrained the excise so that one can transport his person or property across this nation by air, highway or rail, through its ports and along its rivers, without the burden of paying a toll to each of the myriad of taxing jurisdictions that sit astride the lanes of commerce.

If other taxing jurisdictions read the language of Complete Auto Transit as petitioner State does, a proper vehicle for testing the scope of that decision will not be long in coming.[6] A

[6] Soon after this Court approved a head tax on interstate airline passengers (on the basis that the proceeds were limited to the development and maintenance of the airport facility involved), Airport Authority v. Delta Airlines, 405 U.S. 707 (1972), a Senate committee identified at least 31 jurisdictions that had rushed to enact various forms of head taxes. S. Rep. No. 12, 93rd Cong., 1st Sess. (1973). See Appendix A. The committee commented:

> " While this decision has invited state and local governments to enact head taxes or fees on air travelers, the court decision does not provide adequate safeguards to prevent undue or discriminatory taxation."

The "toll gate" syndrome will be more than local legislatures can resist if they believe they have an unbridled excise taxing power over the channels of foreign and interstate commerce. In Complete Auto Transit this Court repeatedly voiced its concern for the "practical" or "economic" effects

thoughtful "clarifying of the scope of state taxing power" (assuming it is needed) should await one or more cases with facts that are in the mainstream of the issue as contrasted with the instant case whose unique, narrow facts reflect only the periphery.

CONCLUSION

The decision below was correctly decided based on decisions by this Court that are squarely in point. The cases relied on by petitioner are not in point. The narrow and unique factual base of the instant case is not appropriate to the State's request that this Court clarify a state taxing power that the State has not asserted.

Nor is the State's alternative request for a remand and further consideration by the court below a tenable request. That court followed decisions of this Court conceded to be squarely in point. Because that court's only alternative

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of a state tax. But once having unleashed the excise on movement in commerce, it may be doubted whether this Court can devote the resources to effectively curb unreasonable burdens. Nor are the guidelines that this Court has thus far laid down against discrimination sufficient to enlist the assistance of state courts.

would be to overrule the decisions of this Court (which no lower court could presume to do), there is no useful work to be done on remand.

The petition should be denied.

Respectfully submitted,

JOHN T. PIPER

Counsel for Respondent

APPENDIX A

AIRPORT PASSENGER TAX

City	Amount	Effective Date	Collecting
1. New Hampshire (on carrier)	$1/$0.50	Aug. 31, 1969	Carrier.
2. Huntsville, Ala.	1.00	July 1, 1972	Airport authority.
3. Philadelphia, Pa.	3.00	do	Carrier.
4. Richmond, Va.	1.00	do	Do.
5. Sarasota-Bradenton, Fla.	1.00	do	Airport authority.
6. Tri-City, Mich.	1.00	do	Carrier.
7. Pensacola, Fla.	1.00	Aug. 1, 1972	Do.
8. Kalamazoo, Mich.	1.00	Aug. 15, 1972	Do.
9. LaCrosse, Wis.	1.00	Sept. 1, 1972	Do.
10. Raleigh-Durham, N.C.	2.00	do	Airport authority.
11. Allentown, Pa.	$2/1.00	Oct. 1, 1972	Do.
12. Traverse City, Mich.	1.00	do	Carrier.
13. Fort Wayne, Ind.	1.00	Oct. 23, 1972	Board of Aviation.
14. Jackson, Miss. (on carrier)	1.00	Nov. 1, 1972	Carrier.
15. Rochester, N.Y.	1.00	do	Do.
16. Des Moines, Iowa	1.00	Nov. 6, 1972	Do.
17. Evansville, Ind.	1.00	Nov. 29, 1972	Do.
18. Roanoke, Va.	1.00	Nov. 15, 1972	Do.
19. Fort Myers, Fla.	1.00	Dec. 1, 1972	Airport authority.
20. Duluth, Minn.	1.00	Jan. 1, 1973	Carrier.
21. Newport News, Va.	1.00	do	Airport authority.
22. Cedar Rapids, Iowa	1.00	do	Do.
23. Madison, Wis.	2.00	Feb. 1, 1973	Carrier.
24. El Dorado, Ark.			
25. Asheville, N.C.	2.00	Jan. 12, 1972	
26. Youngstown, Ohio	1.00		
27. Medford, Oreg.	2.00	Jan. 25, 1973	
28. Eugene, Oreg.	2.00	Feb. 15, 1973	Airport authority.
29. Norfolk, Va.	1.00	Feb. 8, 1973	Carrier.
30. Chattanooga, Tenn.	1.00	Feb. 1, 1973	Airport authority.
31. Tyler, Tex.	2.00		

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OCTOBER TERM, 1976

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITIONER'S OPENING BRIEF

SLADE GORTON
Attorney General
State of Washington

RICHARD H. HOLMQUIST
Senior Assistant Attorney General

MATTHEW J. COYLE
Assistant Attorney General

Office and Post Office Address: Temple of Justice
Olympia, Washington 98504 Telephone: (206) 753-5528

STATE PRINTING PLANT OLYMPIA, WASHINGTON

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OCTOBER TERM, 1976

No. 76-1706

THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON, *Petitioner*,

v.

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES, *et al.*, *Respondents*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITIONER'S OPENING BRIEF

SLADE GORTON
Attorney General
State of Washington

RICHARD H. HOLMQUIST
Senior Assistant Attorney General,

MATTHEW J. COYLE
Assistant Attorney General

Office and Post Office Address: Temple of Justice
Olympia, Washington 98504. Telephone: (206) 753-5528

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OPINION BELOW

The opinion of the Washington State Supreme Court is reported in 88 Wn.2d 315, 559 P.2d 997 (1977) and is reproduced in Appendix A of the Petition for Writ of Certiorari.

JURISDICTION

The opinion of the court below was filed on February 3, 1977 (Pet. Cert., App. A). In Washington, no separate judgment is entered. The remittitur was entered on March 7, 1977 (Pet. Cert., App. B). On June 1, 1977, the Petition for a Writ of Certiorari

was docketed in this Court. On October 3, 1977, this Court granted certiorari. ..... U.S. ..... (1977).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Does the Commerce or Import-Export Clause of the United States Constitution prohibit a general, nondiscriminatory state tax which is (a) imposed on the privilege of engaging in the business of stevedoring, and (b) measured by the gross receipts from stevedoring activity conducted entirely within the taxing state?[1]

CONSTITUTIONAL PROVISIONS, APPLICABLE STATUTES AND ADMINISTRATIVE RULES

United States Constitution, Article I, Section 8, Clause 3 provides in pertinent part:

> "The Congress shall have power * * * To regulate Commerce with foreign Nations, and among the several States * * *;"

The United States Constitution, Article I, Section 10, Clause 2 provides in pertinent part:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws * * *;"

The relevant state statutes and administrative

[1]The QUESTION PRESENTED is phrased somewhat differently from that set forth in the Petition for Certiorari, but the substance of the question presented for review remains the same as that set forth in the Petition and no additional questions are raised. Rule 40(2), Rules of the Supreme Court.

rule are Revised Code of Washington 82.04.220, 82-.04.290 and 82.04.460(1) (Appendix A hereto), and Washington Administrative Code 458-20-193D (Appendix B hereto).

STATEMENT OF THE CASE

A. Nature of the Case.

This is a writ of certiorari directed to the Supreme Court of Washington to review a final judgment of that court declaring a state tax repugnant to the Commerce[2] and Import-Export[3] Clauses of the United States Constitution; Pet. Cert., App. A.

B. Identity of the Parties.

The petitioner, Department of Revenue of the State of Washington (hereinafter the "State") is an administrative agency of the State of Washington charged with the duty of administering and enforcing the excise tax laws of the state. As part of its duties, the Department of Revenue is empowered to adopt rules and regulations necessary or desirable to the administration of the state's tax laws. RCW 82.01.060.

The respondents, Association of Washington Stevedoring Companies and Washington Public Ports Association (hereinafter the "Stevedores") are associations or corporations comprised of members who engage in the business of stevedoring in the State of Washington. (App. p. 3).

[2]U.S. Const., Art. I, §8, Cl. 3.
[3]U.S. Const., Art. I, §10, Cl. 2.

C. **Business of the Stevedores.**

Stevedoring consists of loading and unloading cargo from ships. As reflected in the findings of the trial court, the business of the Stevedores in this case consists of activities of exactly the same nature considered by this Court in *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937), and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947) (App. p. 5, 17). The Stevedores contract with ship owners to load or unload vessels through the Stevedores' own employees, controlling and directing the work themselves. *Puget Sound*, 302 U.S. at 91. Vessels are unloaded by moving the cargo from the ship's hold to the "first place of rest" on the dock; and are loaded by moving the cargo from the place of rest on the dock to the ship's hold. *Puget Sound*, 302 U.S. at 93. More precisely put, stevedoring consists of taking cargo from a place on the pier wholly within the territorial limits of the State of Washington and "* * * storing it properly for safety and for handling in or on the outgoing vessel along side, or of similarly unloading a vessel on its arrival." *Joseph v. Carter & Weekes Stevedoring Co., supra*, 330 U.S. at 425. The vessels and cargo are moving exclusively in foreign or interstate commerce.

D. **Nature of the Tax.**

The tax in question—Washington's general business and occupation tax ("B&O tax")—is virtually the same tax considered by this Court in *Puget Sound*

Stevedoring Co. v. Tax Comm., 302 U.S. 90 (1937).[4] The tax is imposed on the act or privilege of engaging in business activities, measured by the application of rates to the gross sales or gross income of the business. RCW 82.04.220 (App. A hereto). In the case of stevedoring activity, which is classified as a general business or service activity, the measure and rate of the tax at the inception of this litigation was the gross income of the business multiplied by the rate of 1 percent.[5]

The tax reaches virtually every form of business activity conducted in this state. The only major business activities exempt from the tax are farming (RCW 82.04.330), and insurance (RCW 82.04.320). Gross receipts from certain types of income-producing activities are deductible from the measure of the tax. RCW 82.04.430.

In the case of income from services rendered by persons taxable under RCW 82.04.290 who maintain places of business both within and without the state, the tax is apportionable. RCW 82.04.460 (App. A hereto). However, this apportionment requirement does not apply to the Stevedores because they do not

[4]The tax is not unfamiliar to the Court. In addition to *Puget Sound Stevedoring, supra*, this Court has considered the Washington B&O tax in the following cases: *Standard Pressed Steel Co. v. Washington*, 419 U.S. 560 (1975); *General Motors Corp. v. Washington*, 377 U.S. 436 (1964); *Field Enterprises, Inc. v. Washington*, 352 U.S. 806 (1956) [per curiam]; *General Electric Co. v. Washington*, 347 U.S. 909 (1954) [per curiam]; *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939); *Rainier National Park Co. v. Martin*, 302 U.S. 661 (1938) [per curiam]; *Silas-Mason Co. v. Tax Commission*, 302 U.S. 186 (1937); and *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U.S. 650 (1936).

[5]At the present time, the rate is 1.06 percent, due to a temporary across-the-board rate increase due to expire in June, 1979. Laws of 1977, 1st ex. sess., chapter 324, §1, codified as RCW 82.04.2901.

maintain places of business both within and without the state, nor is there any allegation that they do so.

In sum, Washington's B&O tax, as applied to the Stevedores, is imposed upon the business of loading and unloading cargo from ships engaged in interstate and foreign commerce, measured by the gross receipts received by the Stevedores from this activity. The loading and unloading activities take place entirely within the territorial limits of the State of Washington.

E. Proceedings Below.

Prior to 1974, and in response to the 1937 decision of this Court in *Puget Sound Stevedoring Co. v. Tax Commission*, *supra*, a State regulation excluded from the Business and Occupation tax compensation received by a contracting stevedoring company for loading and unloading cargo from vessels where such cargo was moving in interstate or foreign commerce and where the work was actually directed and controlled by the stevedoring company. On May 3, 1974 the State amended its rule and adopted Rule 193-D (App. B hereto) providing in part:

> "In computing tax there may be deducted from gross income the amount thereof derived as compensation for performance of services which in themselves constitute interstate or foreign commerce to the extent that a tax measured thereby constitutes an impermissible burden upon such commerce. A tax does not constitute an impermissible burden upon interstate or foreign commerce unless the tax discriminates against that commerce by placing a burden thereon that is not borne by intrastate commerce, or unless the tax

> subjects the activity to the risk of repeated exactions of the same nature from other states. Transporting across the state's boundaries is exempt, whereas supplying such transporters with facilities, arranging accommodations, providing funds and the like, by which they engage in such commerce is taxable."
>
> • • • •
>
> "EXAMPLES OF TAXABLE INCOME"
>
> • • • •
>
> "3. Compensation received by contracting, stevedoring or loading companies for services performed within this state is taxable."

Subsequent to the adoption of the above rule, the Stevedores sought a declaratory judgment on the validity of the rule pursuant to a procedure authorized by RCW 34.04.070. The sole grounds advanced by the Stevedores for the invalidity of the rule are contained in paragraph VII of their complaint (App. 5) which, set forth in its entirety, reads as follows:

> "The Department's revised Rule 193-D is invalid because it violates the commerce clause, Art. I, section 8, of the United States Constitution (empowering Congress to regulate commerce with foreign nations and among the several states). The rule is also invalid to the extent that it affects foreign commerce covered by the import-export clause contained in Article I, section 10 of the United States Constitution."

The trial court, although noting that if it viewed the case as one of first impression it would uphold the validity of the B&O tax on the Stevedores, nevertheless felt constrained by this Court's decisions in *Puget Sound Stevedoring v. Tax Commission*, 302 U.S. 90 (1937) and *Joseph v. Carter & Weekes Steve-*

doring Co., 330 U.S. 422 (1947), and struck down the regulation as violative of the Commerce and Import-Export Clauses of the United States Constitution. (App. 8-14, 19). On appeal, the Supreme Court of Washington affirmed the decision of the trial court with two justices dissenting. The majority found the *Puget Sound Stevedoring*, *supra*, and *Carter & Weekes*, *supra*, cases to be factually indistinguishable from the present case (Pet. Cert., App. A, p. 8; 88 Wn.2d at 316), and finding no indication that this Court had overruled these two cases by implication the majority felt bound to follow what it viewed as controlling precedent. 88 Wn.2d at 319.

The minority would have upheld the State's rule on taxing stevedores, finding that the "Stevedoring Cases" relied on by the trial court and the majority have been *impliedly* overruled by this Court, citing among other cases, *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938) and *Colonial Pipeline v. Traigle*, 421 U.S. 100 (1975). The minority found that all stevedoring activity takes place wholly within the State and that even if stevedoring could be said to have interstate characteristics, the activity still may be taxed by a nondiscriminatory gross receipts tax if it is apportioned and does not reach activities beyond the State's borders. (Pet. Cert. App. A, p. 17). The minority further found that:

> "[t]his state's business and occupation tax is not selectively imposed. It is a general occupation tax and does not substantially impair or prohibit transportation. As such it does not violate the import-export clause." (Pet. Cert., App. A, p. 17), 88 Wn.2d at 321.

SUMMARY OF ARGUMENT

This case presents the issue of the continuing validity of the principles enunciated in *Puget Sound Stevedoring Co. v. Tax Comm.*, 302 U.S. 90 (1937), and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947), in light of this Court's decisions in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), and *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

The state tax in question, Washington's B&O tax on the act or privilege of engaging in business, measured by gross receipts derived by Stevedores from loading and unloading vessels engaged in foreign and interstate commerce, produces none of the effects prohibited by the Commerce Clause. There is no claim of lack of nexus; nor is there a claim that the tax is unrelated to the opportunities, protections and benefits afforded the Stevedores by the State; nor is there a claim that the State's tax discriminates against interstate and foreign commerce in favor of intrastate commerce. There is a claim of the possibility of "multiple burdens", in the sense that other states may be permitted to tax stevedoring activity a the end of an interstate journey, but that claim is illusory, at best.

In terms of the Commerce Clause, the tax upheld in *Complete Auto Transit* is identical in operation and effect to the tax here in question. Both

taxes are levied on the privilege of engaging in transporting goods moving in interstate commerce, measured by gross receipts from that portion of the journey entirely within the taxing state. The Court in *Complete Auto Transit* upheld Mississippi's tax because it did not produce the effects on interstate commerce forbidden by the Commerce Clause—discrimination against interstate commerce or the possibility of multiple tax burdens on interstate commerce—even though at an earlier time the tax would have been labeled a "direct" tax on interstate commerce. In contrast, the "Stevedoring Cases" struck down gross receipts taxes on the privilege of engaging in transporting goods moving in interstate and foreign commerce on the grounds that such taxes were "direct" taxes on interstate commerce, without considering the effect of the tax. Accordingly, the Court, on authority of *Complete Auto Transit*, should uphold Washington's tax on the business of engaging in stevedoring activities and overrule the "Stevedoring Cases".

Insofar as the validity of the tax in question under the Import-Export Clause is concerned, the case is controlled by the analysis and result in *Michelin Tire Corp. v. Wages, supra*. In upholding a general, nondiscriminatory ad valorem personal property tax imposed on goods held by an importer in its warehouse, this Court in *Michelin* focused on the meaning of the term "imposts" and "duties" with reference to the purposes to be served by the Import-

Export Clause. The Court reasoned that a nondiscriminatory state tax, not directed toward imports as such was not an "impost" or "duty" within the meaning of the Import-Export Clause because such a tax (1) would not deprive the United States of the exclusive power to regulate foreign commerce, (2) would not deprive the United States of the exclusive right to all revenues from imposts and duties on exports and imports, and (3) would not prohibit the free flow of imported goods among the states by exacting "transit fees" from goods moving through seaboard states to inland states. Washington's B&O tax is a general, nondiscriminatory tax not directed at imports or exports as such and is not a mere "transit fee" for the privilege of transporting goods through the state. Consequently, it does not constitute an "impost" or "duty" within the meaning of the Import-Export Clause, and the tax should be sustained on authority of *Michelin*.

ARGUMENT

A. Introduction.

This case squarely presents the issue of the continuing validity of the principles enunciated in *Puget Sound Stevedoring Co. v. Tax Comm.*, 302 U.S. 90 (1937), and *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947), hereinafter referred to as the "Stevedoring Cases". The State asks nothing less of this Court than to overrule its prior decisions in the Stevedoring Cases on the grounds that the principles upon which the Stevedoring Cases are based

are not reconcilable with the principles established in the recent cases of *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), and *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

Therefore, at the outset, it is important to establish what this case does *not* involve. First, unlike many cases involving state taxation of interstate commerce or activities related thereto, there is no claim that the state tax violates due process.[6] There is no claim or showing of lack of nexus. Nor is there a claim or showing that the tax is unrelated to the opportunities, protections and benefits afforded the stevedores by the state. Second, there is no claim or showing that the State's tax discriminates against interstate and foreign commerce in favor of intrastate commerce.[7] Third, there is no claim or showing that the tax is a licensing provision or otherwise amounts to a direct regulation of commerce.[8]

Rather, the sole claims advanced by the Stevedores are based upon the rationale of the "Stevedoring Cases," namely: (1) the Commerce Clause, of its own force and effect, creates a free trade zone for interstate commerce, and (2) an unapportioned gross receipts tax on the business of local stevedoring creates the risk of a multiple burden on interstate commerce because other states may tax stevedoring activity at the end of the interstate journey.[9]

[6]See, *Standard Pressed Steel v. Washington*, 419 U.S. 560 (1975); *General Motors Corp. v. Washington*, 377 U.S. 436 (1964).

[7]See, *Boston Stock Exchange v. State Tax Comm.*, ...U.S. ..... (1977); *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64 (1963); *Nippert v. Richmond*, 327 U.S. 416 (1946).

[8]See, *Leloup v. Port of Mobile*, 127 U.S. 640 (1888).

[9]*Joseph v. Carter & Weekes Stevedoring Co.*, *supra*, 330 U.S. at 429.

For purposes of analysis, the State's argument is divided into two categories; (1) the validity of the State's tax under the Commerce Clause and (2) the validity of the State's tax under the Import-Export Clause. To a certain extent, the considerations helpful to a resolution of the issues under these two constitutional provisions overlap, but because the purposes of the Commerce Clause and Import-Export Clause are in many respects different, we discuss each separately.

B. The Challenged Tax on Stevedoring Activities Comports With the Commerce Clause.

1. *A state may, consistent with the Commerce Clause, impose a tax on the act or privilege of engaging in the business of transporting goods moving in interstate or foreign commerce where the tax (a) is applied to an activity with a substantial nexus to the taxing state, (b) is fairly related to the opportunities, protections, and benefits afforded the activity by the taxing state, (c) does not discriminate against interstate or foreign commerce in favor of intrastate commerce, and (d) does not expose the interstate or foreign commerce activity to the risk of multiple taxation burdens.*

In a series of recent cases, this Court has finally resolved more than 40 years of judicial conflict over the scope of the restrictions imposed by the Commerce Clause on the power of a state to tax interstate and foreign commerce conducted entirely within that state's borders. Establishing the scope of these re-

strictions requires the reconciliation of competing demands, on the one hand, from the states for tax revenue to support governmental services provided such commerce and, on the other hand, from the necessity that interstate and foreign commerce not be restrained or unduly burdened by artificial barriers or tariffs set up by the states through which such commerce moves.

Over the years, this Court, as chief arbiter of these competing demands, has adopted two seemingly inconsistent approaches to determining the validity of a state tax on interstate commerce: (1) the "direct-indirect" burden on interstate commerce approach[10] and (2) the cumulative or "multiple burdens" approach.[11] The "direct-indirect" approach is based upon the view that interstate commerce should enjoy total immunity from state taxation.[12] Under this approach state taxes found to be levied "directly" on interstate commerce, e.g., taxes imposed on the privilege of engaging in interstate commerce, measured by gross receipts, whether or not apportioned, were struck down[13] while state taxes said to be levied only "indirectly" on interstate commerce, e.g. taxes imposed on some local event determined to be separate and apart from interstate commerce, were upheld.[14]

[10]See, *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292 (1917); *Ozark Pipeline Corp. v. Monier*, 266 U.S. 555 (1925).

[11]See, *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938).

[12]Hartman, *State Taxation of Interstate Commerce*, p. 31 (1953).

[13]See, *Atlantic & Pacific Tel. Co. v. Philadelphia*, 190 U.S. 160 (1930); *Crew Levick, supra*; *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951).

[14]See, *Utah Power & Light Co. v. Pfost*, 286 U.S. 165 (1932); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923).

The "multiple burdens" approach is based upon the view that interstate commerce should contribute to the cost of local governmental services it receives so long as it is not unreasonably restrained by being subjected to the risk of multiple tax burdens not borne by local business.[15] Under this approach, state taxes on interstate commerce found to be capable of being repeated by each state through which the commerce moved were struck down[16] while state taxes on interstate commerce not capable of being repeated by each state were upheld.[17]

Permitting a state to impose a tax on the privilege of engaging in a component part of interstate commerce wholly within the taxing state, e.g., the privilege of exercising corporate powers,[18] so long as the tax is imposed on and measured by activities wholly within the taxing state on the grounds that it is an "indirect" type tax accomplishes the same result as would the "multiple burdens" test; interstate commerce pays its way in the taxing state while at the same time there is no possibility that other states can tax the same activity. Thus, as a practical matter, the Court has in recent years permitted a variety of state taxes on interstate commerce which do not produce the "trade barrier" effect forbidden by the Commerce Clause, even though arguably the taxes could be said to be of a "direct nature". See, generally, W. Heller-

[15]Hartman, *State Taxation of Interstate Commerce*, p. 38 (1953).

[16]See, e.g., *Gwin, White & Prince v. Henneford*, 305 U.S. 434 (1939).

[17]*Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

[18]*Memphis Natural Gas Co. v. Stone*, 335 U.S. 80 (1948); *Colonial Pipeline v. Traigle*, 421 U.S. 100 (1975).

stein, State Taxation of Interstate Business and the Supreme Court, 1974 Term: *Standard Pressed Steel* and *Colonial Pipeline*, 62 Va. L. Rev. 149, 177-180 (1976).

Nevertheless, until 1977, there remained one form of state taxation of interstate commerce—a tax on the privilege of engaging in interstate commerce —which was forbidden by this Court's decisions even though the tax did not in practical operation and effect discriminate against interstate commerce or expose it to the risk of multiple tax burdens. *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203 (1925); *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951). The rationale for these decisions was twofold: (1) states had no power to tax the privilege of engaging in interstate commerce because it was a privilege given by the federal government (*Crutcher v. Kentucky*, 141 U.S. 47 [1891]), and (2) a privilege tax is a "direct" tax on interstate commerce forbidden by the Commerce Clause of its own force and effect. *Spector*, *supra*.

The "*Spector* Rule" as it was known, ignored the practical economic consequences of a state tax on interstate commerce and instead substituted an inquiry into the phraseology of the tax. For this reason, the rule was severely criticized by commentators. See, e.g.. Barret, State Taxation of Interstate Commerce —"Direct Burdens", "Multiple Burdens" Or What Have You?, 4 Van. L. Rev. 497, 505 (1951); Hartman, State Taxation of Interstate Commerce, p. 45

(1953); Comment: State Taxation of Interstate Commerce: *Roadway Express*, The Diminishing Privilege Tax Immunity, and the Movement Toward Uniformity and Apportionment, 36 U. Chi. L. Rev. 186, 203.

As stated in Hartman, *supra*, at p. 31-43:

> "The view that interstate commerce is immune from taxation, with its concomitant expressions of 'direct' and 'indirect' effects and burdens, for many years remained the alleged test by which the court struck down a wide variety of state taxes. This conceptual and unrealistic mode of judicial thought gave very little consideration to the practical question of economic burden of the tax. What condemned the tax was not any actual or probable hampering effect of the exaction on the commerce; the vice of an invalid tax was simply the 'direct' bearing of the tax on interstate commerce and that alone * * * The alleged test simply implied the impotence of state power; it described a result reached, not the reasons for that result. The Court was more concerned with captions than with consequences."

Finally, in 1977, the Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), was presented with a case directly calling into question the continued validity of the "*Spector* Rule". *Complete Auto Transit* involved a Mississippi tax which was imposed on the "privilege of doing business" within the state as applied to the activity of a motor carrier transporting manufacturer's automobiles between points in the state, and was measured by the gross receipts from that transportation. The automobiles concededly were moving in interstate commerce

from the manufacturer to the ultimate retailer. The taxpayer transported the vehicles in its own trucks from a railhead in Mississippi to dealers throughout the state.

The taxpayer contended that the legal incidence of the Mississippi tax was upon the "privilege" of engaging in interstate commerce and was thereby prohibited under the "*Spector* Rule". No claim was made that Mississippi lacked sufficient nexus with the taxpayer or that the tax discriminated against interstate commerce or was unfairly apportioned or was unrelated to the services provided the taxpayer by the state. Furthermore, although the taxpayer claimed that the Mississippi tax created an unacceptable risk of undue burdens, no showing was made that undue burdens existed in fact.

In a unanimous decision, this Court upheld Mississippi's tax on the unapportioned gross receipts derived from wholly intrastate transportation in interstate commerce.

In its analysis of the case, the Court first noted that the "*Spector* Rule" ignores any consideration of the practical effect of a state tax on interstate commerce and reflects a philosophy that interstate commerce should enjoy a type of "free trade" immunity from state taxation. 430 U.S. at 278. The "*Spector* Rule" thus differs sharply from the "multiple burdens" approach taken by the Court beginning with *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938), which concentrated on the practical

effects of the tax on interstate commerce. In describing the "multiple burdens" line of cases, this Court stated:

> "These decisions have considered not the formal language of the tax statute, but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." (footnotes omitted) 430 U.S. at 279.

These decisions reconcile the competing demands on interstate commerce by requiring that interstate commerce pay its way in the taxing state, while at the same time insuring that no state can erect artificial barriers or tariffs to the conduct of interstate commerce.

In rejecting the "*Spector* Rule" this Court is now firmly and clearly committed to the "discrimination-multiple burdens" approach advanced by Mr. Justice Stone in his dissent in *DiSanto v. Pennsylvania*, 273 U.S. 34 (1927), and in his opinion for the majority in *Western Live Stock, supra*. Under this approach, a state may, consistent with the Commerce Clause, impose a tax on the privilege of engaging in the business of transporting goods moving in interstate or foreign commerce where the tax (a) is applied to an activity with a substantial nexus to the taxing state,[19] (b) is fairly related to the opportunities, protections,

[19] See, *General Motors Corp. v. Washington*, 377 U.S. 436 (1964); *Standard Pressed Steel Co. v. Dept. of Revenue*, 419 U.S. 560 (1975).

and benefits afforded the activity by the taxing state,[20] (c) does not discriminate against interstate or foreign commerce in favor of intrastate commerce,[21] and (d) does not expose the interstate or foreign commerce activity to the risk of multiple burdens.[22]

None of the above cited cases involve "foreign commerce". However, in this context, it has long been assumed that the Foreign Commerce and Interstate Commerce Clauses of the United States Constitution are indistinguishable. For example, in *Cook v. Pennsylvania*, 97 U.S. 566, 574 (1878), a case striking down a discriminatory tax on auctioneers of imported goods, the Court drew freely upon cases striking down discriminatory taxes on interstate commerce, stating:

> "If a tax assessed by a State injuriously discriminating against the products of a State of the Union is forbidden by the Constitution, a similar tax against goods imported from a foreign state is equally forbidden."

See, also *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292 at 296 (1917).

Also instructive is *Matson Navigation Co. v. State Board of Equalization*, 297 U.S. 441 (1936). *Matson* involved the imposition of California's tax on corporations exercising their corporate franchise within the state, measured by apportioned net income derived from intrastate, interstate, or foreign commerce. The taxpayer was a corporation which, in

[20]See, *Memphis Gas Co. v. Stone*, 335 U.S. 80 (1948); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1940).

[21]See, *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *Nippert v. Richmond*, 327 U.S. 416 (1946).

[22]See, *Adams Manufacturing Co. v. Storen*, 304 U.S. 307 (1938); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939).

addition to doing a substantial intrastate business in California, was engaged in the transportation of cargo by sea between the west coast of the United States and ports in Hawaii, the South Sea Islands, Australia and New Zealand. California included in its taxable income base an apportioned segment of the net income derived from interstate and foreign commerce operations. In upholding the tax, the Court did not distinguish between income derived from interstate operations as opposed to income derived from foreign commerce operations. Both types of income were held to be includable in the tax base.

There is no good reason why foreign commerce should be treated any differently from interstate commerce. When carried on within the boundaries of a state, foreign commerce should pay its own way, so long as such commerce is not discriminated against or subjected to the risk of multiple burdens. As applied to the activities of handling or transporting goods moving in foreign commerce a state tax stands on the same footing under the Foreign Commerce Clause as it does under the Interstate Commerce Clause. Both clauses are worded the same way, i.e. as a restriction upon state regulation. If a nondiscriminatory state tax, fairly apportioned, is not considered a forbidden "regulation" of interstate commerce, a nondiscriminatory state tax, fairly apportioned should not be considered a forbidden "regulation" of foreign commerce.

In sum, after *Complete Auto Transit v. Brady*,

supra, it is settled that a state may impose a tax on the privilege of engaging in the business of transporting goods moving in interstate or foreign commerce measured by gross receipts so long as the tax (a) is applied to an activity with a substantial nexus to the taxing state, (b) is fairly related to the opportunities, protections and benefits afforded the activity by the taxing state, (c) does not discriminate against interstate or foreign commerce in favor of intrastate commerce, and (d) does not expose the interstate or foreign commerce activity to the risk of multiple burdens.

2. *Washington's B&O tax on the privilege of engaging in local stevedoring activity, measured by gross receipts, exhibits adequate nexus, is nondiscriminatory, and does not expose interstate or foreign commerce to the risk of multiple burdens.*

Washington's B&O tax, as applied to the Stevedores, is imposed upon the act or privilege of engaging in the business of loading and unloading cargo from ships engaged in interstate and foreign commerce, and is measured by the gross receipts received by the Stevedores from this activity. RCW 82.04.220 (App. A hereto). The tax is unapportioned, in the sense that it is measured by the entire gross receipts of the Stevedores from loading and unloading activities; but the tax is, as a practical matter, self apportioning because the loading and unloading activities of the Stevedores take place entirely within the territorial limits of the State of Washington and nowhere else.

The tax here in question is virtually indistinguishable from the Mississippi tax considered in *Complete Auto Transit*. Mississippi's tax was imposed on the privilege of engaging in the business of transporting persons or property for hire between points within the state, measured by gross receipts from that transportation. The only difference between Washington's tax and the Mississippi tax (other than the rate) was the requirement that the Mississippi tax be added to the gross sales price and collected from the purchaser. Miss. Code Ann. §10117 (1942); 430 U.S. at 275. Washington's B&O tax, unlike the Mississippi tax, is clearly imposed upon the Stevedores, and not the steamship companies the Stevedores service. RCW 82.04.500 provides:

> "It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers, but that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons."

Thus, unlike Mississippi's tax, which may, and probably would, be passed on directly to the owner of the goods moving in interstate commerce, Washington's tax is not required to be passed on to the owner of the goods moving in interstate or foreign commerce, and it is not at all clear as a matter of economics that the tax, or any substantial part of it is or will be passed on.[23]

[23]Thus, if one were still to subscribe to the "direct-indirect" theory

In the courts below, the Stevedores did not argue that Washington had insufficient nexus to impose its tax, nor did they argue that the tax was unrelated to the opportunities, protections and benefits afforded the Stevedores by the State of Washington. This is not surprising, given that the Stevedores conduct business exclusively within the State of Washington and are the recipients of numerous opportunities, protections and benefits, ranging from police and fire protection for their property to access to the state court system to enforce payment of stevedoring contracts.

Similarly, the Stevedores did not argue in the courts below that Washington's B&O tax discriminates against interstate or foreign commerce in favor of local commerce. This too, would be an empty exercise, because the tax rate on the stevedoring business is the same as the tax rate on most other persons who render services in the state, e.g. doctors, lawyers, accountants, etc. RCW 82.04.290 (App. A hereto). To be sure, the Washington State Legislature could manipulate the B&O tax in such a way as would be discriminatory against stevedoring activity. But as noted by the Court in *Complete Auto Transit*, *supra*, property taxes, income taxes, and "privilege" taxes are susceptible to being imposed with discriminatory results. *Complete Auto Transit*, *supra*, n. 15,

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of state taxation of interstate commerce Washington's tax would be a much stronger candidate for validity under the Commerce Clause than would have Mississippi's tax upheld in *Complete Auto Transit*, *supra*. Cf., *Silas-Mason Co. v. Tax Comm.*, 302 U.S. 190 (1937), which held that Washington's B&O tax on federal contractors is not an "unconstitutional burden" on the Federal Government. 302 U.S. at 190.

430 U.S. at 288. The mere possibility, however, of imposing a tax with discriminatory effects or other effects forbidden by the Commerce Clause is not grounds for striking down a state tax without those effects.

Finally, the Stevedores in the courts below did not argue that Washington's B&O tax on stevedoring exposed interstate or foreign commerce to the risk of multiple burdens. See, Brief of Respondents before the Washington Supreme Court, pp. 36-37. Thus, no effort was made to establish that Washington's B&O tax created a risk, actual or theoretical, that interstate commerce would be subject to multiple tax burdens. Nor could any such effort be successful.

The case for a theoretical possibility of multiple tax burdens created by the tax in question is set forth in *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1946). That case involved a New York City gross receipts tax on the business of stevedoring in the City as applied to gross receipts from loading and unloading ships engaged in foreign and interstate commerce. Although primarily basing its decision to invalidate the tax as a "privilege" tax on the business of engaging in interstate and foreign commerce, citing *Puget Sound Stevedoring Co.*, 302 U.S. 90 (1937), the majority also noted that New York City's tax exposed interstate commerce to the risk of multiple tax burdens, finding that if New York City were able to tax the loading of ships, some other state could tax the unloading of ships, or vice versa.

Carter & Weekes, *supra*, 330 U.S. at 429. Justices Douglas and Rutledge, dissenting in part, found that no multiple burdens, actual or theoretical, could exist. The dissenters noted:

> "But in the Puget Sound Case any risk of multiple taxation was absent. The same is true of the present case. For in each the activity of loading and unloading was confined exclusively to the State that imposed the tax. No other state could tax the same activity.[a]
> "The tax therefore is in its application nothing more than a gross receipts tax apportioned to reach only income derived from activities within the taxing state." *Carter & Weekes*, *supra*, 330 U.S., 437-438 (footnote in the original).
> fn. 3—"The court suggests that the fact that similar stevedoring activity will be required at the destination creates a risk of multiple taxation, since the state of destination would be as free to tax the unloading as New York to tax the loading. This is only multiple in the sense that each state taxes what occurs within its borders; the two taxes would not be on the same activity. It is no more relevant that stevedoring is involved in both cases, than is the fact that two states may impose property taxes on terminals or trackage within their respective borders."

Clearly, Justices Douglas and Rutledge were correct. The multiple burden found by the Court to be present in the *Carter & Weekes* case is multiple only in the sense that the elements of interstate transportation are multiple. But the "multiple burdens" test is directed to the risk of taxation of the same *activity*. For example, in *Coverdale v. Arkansas-Louisiana Pipe Line Co.*, 303 U.S. 604 (1937), the Court found no risk of multiple burdens resulting from

state excise taxes on the various mechanical processes used to transport gas through interstate pipelines. Similarly, in *Canton Ry. Co. v. Rogan*, 340 U.S. 511 (1951), the Court sustained a Maryland gross receipts tax on the business of transporting by rail goods moving in interstate and foreign commerce where the tax was apportioned on the basis of mileage within the state and did not reach any activities carried on beyond the borders of the state.

Finally, the commentators have criticized the *Carter & Weekes* majority on their view of "multiple burdens" effect. See, Powell, More Ado About Gross Receipts Taxes, 60 Harv. L. Rev. 710, at 744-46 (1947); Hartman, State Taxation of Interstate Commerce, pp. 204-207. It is thus apparent that under the proper view of the "multiple burdens" test, Washington's B&O tax on the business of engaging in stevedoring activity does not create the risk of a multiple burden on interstate commerce. Although nominally unapportioned, it is in fact apportioned exactly to the activities of the Stevedores within the State. It does not reach out beyond the state's borders to tax activities occurring elsewhere. No other state can impose a tax on the same stevedoring activity. Consequently, no multiple burden, actual or theoretical, exists.

For the foregoing reasons, it is clear that the tax in question, as applied to local stevedoring activity, meets the criteria for validity established by a long line of decisions of this Court culminating in

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). The tax is applied to an activity with adequate nexus to Washington, it is fairly related to the services provided by the state, it does not discriminate against interstate or foreign commerce, and it does not expose interstate or foreign commerce to the risk of multiple burdens. In sum, there exists no reason to strike down this tax as violative of the Commerce Clause except upon the now discarded theory that a tax upon the privilege of engaging in interstate commerce is a direct tax on interstate commerce. See, *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951).

3. *The "Stevedoring Cases" represent outmoded concepts, were wrongly decided, and should be overruled.*

Finally, we come to the issue of whether the "Stevedoring Cases", *Puget Sound Stevedoring, supra*, and *Joseph v. Carter & Weekes Stevedoring Co., supra*, should be overruled. First, it is clear that if the tax in the instant case is to be upheld, the "Stevedoring Cases" must be overruled. *Puget Sound Stevedoring* involved the same facts and virtually the same tax as is involved in the instant case. *Carter & Weekes, supra*, also involved the same type of tax—a city gross receipts tax on the privilege of engaging in business—as applied to the same type of stevedoring activity as is involved in the instant case. Indeed, both the trial court below and the Supreme Court of Washington found the "Stevedoring Cases"

to be indistinguishable from the instant case. See, Oral Decision of the Trial Court, App. 8; Opinion of the Washington Supreme Court, Pet. Cert. App. A, p. 10, 88 Wn.2d at 316.

The only question to be answered with respect to the continuing validity of the "Stevedoring Cases" under the Commerce Clause is whether they can stand, consistent with this Court's decision in *Complete Auto Transit*. The State has already demonstrated that Washington's B&O tax on the privilege of engaging in local stevedoring activity is indistinguishable in operation and effect from the Mississippi tax upheld in *Complete Auto Transit, supra*. See p. 23 *supra*. The state taxes involved in the "Stevedoring Cases" are equally indistinguishable in operation and effect from the Mississippi tax involved in *Complete Auto Transit*. In all cases, the tax is an unapportioned gross receipts tax imposed upon the privilege of engaging in the business of transporting goods moving in interstate commerce. The fact that *Complete Auto Transit* involved land transportation as opposed to water shipborne transportation involved in the "Stevedoring Cases" is irrelevant to a determination of the effects of the tax upon interstate or foreign commerce.

The only significant difference between the "Stevedoring Cases" and *Complete Auto Transit* is this Court's view of the nature and effect of a tax on the privilege of engaging in business in interstate commerce, measured by gross receipts fairly apportioned to the activities within the taxing state. In the

"Stevedoring Cases," the privilege tax was viewed to be a "direct" tax on interstate commerce and therefore a *per se* burden on that commerce. It was the "label" attached to the tax which offended the Commerce Clause, and not the effect in practical terms on interstate commerce. In *Complete Auto Transit* it was the *effect* of the tax in practical terms on interstate commerce which provided the touchstone for determining the validity of the tax under the Commerce Clause, regardless of the "label" attached to the tax by a state.

Complete Auto Transit clearly represents the better approach. By rejecting the view that interstate commerce should enjoy a "free trade zone" of immunity from state taxation, the Court has required interstate comerce to "pay its way." At the same time, by focusing on the practical effect of a state tax on interstate commerce, the Court has instituted a realistic, pragmatic approach to legal analysis of the constitutional issues, and abandoned the formalistic search for the correct "label" on the state tax.[24] This approach gives intellectual legitimacy to the Court's Commerce Clause decisions and also goes a

[24]The error of basing a decision upon the "remoteness" or "proximity" of the activity in question to interstate commerce is perhaps best illustrated by *Puget Sound Stevedoring, supra, itself*. In that case, the Court held that the state could not impose its tax on gross receipts derived by stevedoring companies where the companies furnished stevedores to the vessels and directed and controlled the work of the stevedores themselves. On the other hand, the Court saw no problem with the state imposing its tax on gross receipts received by the stevedoring companies when the companies furnished stevedores to the vessels, but did not control or direct the stevedore's work. In the former case, the stevedoring companies were viewed as the employers and in the latter case the stevedoring companies were viewed somewhat akin to an employment agency. Surely this is the classic case of a "distinction without a difference".

long way toward insuring the predictability of court decisions involving state taxation of interstate and foreign commerce.

Not only do the "Stevedoring Cases" represent the outmoded concepts of the "direct-indirect" approach to state taxation of interstate and foreign commerce, but the cases, to the extent they were decided on the basis that a gross receipts tax on local stevedoring activity created a risk of multiple burdens on interstate and foreign commerce (*Carter & Weekes, supra*), were wrongly decided. As noted *supra*, p. 26, the "multiple burdens" test is directed to the risk of multiple taxation on the same activity, and the loading and unloading of ships at the beginning and end of an interstate or foreign journey are two separate activities. *Carter & Weekes, supra*, 330 U.S. at 437 (Douglas, J., dissenting). So long as each state taxes only those activities occurring entirely within its borders, no risk of multiple burdens exists.

The "Stevedoring Cases" should be overruled. The cases are irreconcilable with *Complete Auto Transit*, they represent outmoded concepts of Commerce Clause analysis, they were wrongly decided, and they provide an exemption from state taxation, judicially created, which is unnecessary to the accomplishment of the purposes for which the Commerce Clause was adopted. No reason exists for continued adherence to the principles and philosophy underlying the "Stevedoring Cases."

C. The Challenged Tax on Stevedoring Activities Comports With the Import-Export Clause.

1. *A state may, consistent with the Import-Export Clause, impose a tax on the act or provilege of engaging in the business of transporting goods moving in foreign commerce, i.e., imports and exports, where the tax is nondiscriminatory and not directed at imports or exports as such.*

The Import-Export Clause, Art. I, sect. 10, cl. 2 of the United States Constitution, provides in pertinent part:

> "No state shall, without the Consent of the Congress lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws. * * *"

The Import-Export Clause is related to the Commerce Clause in that both deal with state taxation of trade between the United States and foreign nations. In several cases, a state tax has been held to be unconstitutional under both the Import-Export and the Commerce Clauses. See e.g., *Brown v. Maryland*, 12 Wheat. (25 U.S.) 419 (1827); *Crew Levick Co. v. Pennslyvania*, 245 U.S. 292 (1917); *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947) (Douglas, J., dissenting). There are, however, significant differences in the two clauses. The Commerce Clause is cast in terms of a grant of power to Congress to regulate foreign commerce. The Import-Export Clause, on the other hand, contains a flat prohibition forbidding the states to impose imposts or

duties on imports or exports. See *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946).

Not only is the wording of these two constitutional provisions different, but the purposes, although related in some respects, are different. Recently, the purposes of the Import-Export Clause were summarized by this Court in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976):

> "The Framers of the Constitution thus sought to alleviate three main concerns by committing sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power: the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the inland States not situated as favorably geographically. (footnotes omitted)" 423 U.S. at 285.

Of course, the same is true for exports. *Richfield Oil Corp., supra.*

The purpose of the Commerce Clause, as applied to foreign commerce, may be said to be the same as the last purpose of the Import-Export Clause articulated by the *Michelin* court, *supra*—a prohibition of the power of states to erect artificial barriers

and tariffs upon commerce moving through a state and going to or coming from a foreign nation. See, *Brown v. Maryland, supra.*

Over the years this Court has taken several approaches to analyzing the validity of state taxes alleged to violate the Import-Export Clause. One approach was to classify the tax as a "direct" or "indirect" tax on imports or on the business of importing or exporting. In *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292 (1917), a tax on the privilege of selling goods in foreign commerce, measured by gross receipts, was held violative of the Import-Export Clause because it was a "direct" burden on exports.[25] In *Peck & Co. v. Lowe*, 247 U.S. 165 (1918), a federal net income tax on income derived from the business of exporting goods was upheld against a challenge under U. S. Const., Art. I, sec 9, cl. 5.[26] on the ground that a net income tax was an "indirect" burden on exporting.

Similarly, in *Commonwealth Board of Finance & Revenue v. Northern Metal Co.*, 416 Pa. 75, 204 A.2d 467 (1964), *cert. denied*, 380 U.S. 944 (1965), the Pennsylvania Supreme Court held that the state's corporate net income tax, imposed for the privilege of doing business in the state, could be applied to a stevedoring company loading and unloading vessels moving in a combination of foreign, interstate and

[25]The tax was also held to be a "regulation" of foreign commerce in violation of the Commerce Clause. The tax in *Crew Levick* would also have been invalidated as applied to sales in interstate commerce. See, *Gwin, White & Prince v. Henneford*, 305 U.S. 434 (1939).

[26]U. S. Const., Art. I, sec. 9, cl. 5 provides in part: "No Tax or Duty shall be laid on articles exported from any State. * * *."

intrastate commerce, where all activities of the company took place within the taxing state. The Pennsylvania court held that the tax did not violate the Import-Export Clause and distinguished *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947) on the grounds that *Carter & Weekes* involved a gross receipts tax. As stated by the court:

> "Pennsylvania imposes no tax upon Appellant's gross receipts; rather the tax is upon net income, a factor far removed from the import-export process. Accord, Peck & Co., Inc. v. Lowe, citation omitted." 204 A.2d at 473.

Another approach taken by this Court was in attempting to identify the time at which an absolute immunity from state taxation attached to goods or activities because of the *status* of such goods as imports or exports or the *status* of such activities as importing or exporting. In *Brown v. Maryland*, 12 Wheat. (25 U.S.) 419 (1827), the Court struck down a state license tax required of sellers of imported goods on the grounds that, among other things, the tax reached the imported goods while they were still imports. 12 Wheat. at 443. In *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534 (1959), the Court upheld a state property tax on iron ore imported from foreign countries which had been committed to the manufacturing process. The Court found that the iron ore, once committed to the manufacturing process, had lost its status as an "import" and thus was taxable by the state. See also, *Empresa Siderurgica S.A. v. County of Merced*, 337 U.S. 154 (1949)

(state property tax on a manufacturing plant being dismantled and shipped to a foreign country); *Kosydar v. National Cash Register Co.*, 417 U.S. 62 (1974) (state property tax on business machines stored in a warehouse awaiting shipment to a foreign country). In *Canton Ry. Co. v. Rogan*, 340 U.S. 511 (1951), a state franchise tax upon a railroad company measured by gross receipts apportioned to the mileage of track within the state was held not to violate the Import-Export Clause even though the railroad transported goods which were themselves imports or exports. The Court fixed the zone of immunity for transporting imports and exports at the "water's edge." As stated by the Court:

> "So far as taxes on activities connected with bringing exports to or imports from the ship are concerned, we think the line must be drawn at the water's edge. Whether loading and unloading would be exempt is a question we reserve." 304 U.S. at 521).

A third approach taken by the Court was to determine whether the state tax in question was an "impost" or "duty" within the meaning of the Import-Export Clause. The answer to this question was determined by reference to the purposes of the Import-Export Clause. If a state tax, whatever its nomenclature, did not cause the evils which the Import-Export Clause was designed to prevent, the tax was upheld. In *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. (53 U.S.) 299 (1851), the Court upheld pilotage fees imposed by the City of Philadelphia against the argument that these fees

were prohibited "imposts or duties." The Court noted that pilotage fees did not come within the ordinarily understood meaning of the term "imposts or duties" and did not contravene one of the purposes of the Import-Export Clause, uniformity of taxation of imports and exports throughout the United States. In *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), the Court upheld a state's general, nondiscriminatory ad valorem property tax imposed on an inventory of imported tires located at the importer's warehouse. Without addressing the question of whether the tires had lost their status as "imports", the Court held that a nondiscriminatory ad valorem property tax was not a prohibited "impost or duty" on imports. *Michelin*, 423 U.S. at 279.

For our purposes the significance of the *Michelin* decision lies not in its overruling of the "original package doctrine" (*Low v. Austin*, 13 Wall. [80 U.S.] 29 [1872]), but rather in the analysis employed by the Court. Noting that by its terms the Import-Export Clause does not prohibit every state tax on imports, the Court focused on the meaning of the term "imposts" and "duties" with reference to the purposes of the Import-Export Clause. As stated by the Court:

> "The characteristic common to both 'imposts' and 'duties' was that they were exactions directed at imports or commercial activity as such and, as imposed by the seaboard States under the Articles of Confederation, were purposefully employed to regulate interstate and foreign commerce to tax States situated less favorably geographically.

> "In any event, since prohibition of nondiscriminatory ad valorem property taxation would not further the objectives of the Import-Export Clause, only the clearest constitutional mandate should lead us to condemn such taxation. The terminology employed in the clause—'Imposts or Duties'—is sufficiently ambiguous that we decline to presume it was intended to embrace taxation that does not create the evils the clause was specifically intended to eliminate." 423 U.S. at 291-294. (footnotes omitted)

Stated otherwise, restrictions on state taxing power imposed by the Import-Export Clause cannot be determined in a vacuum, nor should such restrictions be determined by resort to the use of "labels." In this respect, the Court is employing exactly the same analysis as that in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977)—determining whether a state tax produces effects forbidden by the constitution without regard to the particular label attached to the tax. Surely, this pragmatic approach to Import-Export Clause analysis is vastly preferable to an inquiry into the "direct-indirect" nature of the tax, *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292 (1917), or a search for the point in time when goods or activities obtain the status of "imports" or "exports", *Canton Ry. Co. v. Rogan*, 340 U.S. 511 (1951).

The purposes of the Import-Export Clause, as viewed by this Court in *Michelin*, may be stated as follows: (1) to commit to the United States the exclusive power to regulate foreign commerce, (2) to commit to the United States the exclusive right to

all revenues from imposts and duties, and (3) to assure the free flow of imported goods among the states by prohibiting taxation of goods merely flowing through seaboard states to inland states. 423 U.S. at 285-290. As applied to a state tax on the act or privilege of engaging in the business of *transporting* goods moving in foreign commerce, i.e. imports and exports, the purposes of the Import-Export Clause are not undermined where the state tax (1) is a general, nondiscriminatory tax not directed at imports or exports as such, and (2) does not constitute a mere "transit fee" for the privilege of moving goods through a state. *Michelin Tire Corp., supra.*

2. *Washington's B&O tax, as applied to the business of stevedoring cargo in foreign commerce, is a general, nondiscriminatory tax not directed at imports or exports as such and is not a mere transit fee for the privilege of transporting goods through the state.*

We have previously discussed in detail the nature and operation of Washington's B&O tax as applied to the Stevedores. See, pp. 4-6, *supra.* To summarize, the tax is imposed on the act or privilege of engaging in business, measured by gross recipts. RCW 82.04.220 (App. A hereto). The tax reaches virtually every business activity in the state, and the tax rate as applied to the business of engaging in stevedoring activity is the same as most other businesses of a "service" nature, e.g., doctors, lawyers and accountants. RCW 82.04.290 (App. A hereto).

As applied to the Stevedores, the tax reaches only those activities performed entirely within the state.

Does Washington's B&O tax, as applied to stevedores, have any impact on the exclusive right of the United States to regulate foreign commerce? We think not. The tax is a general tax on business. Insofar as stevedoring is concerned, the tax is not directed to imports or exports as such, and does not amount to a tariff on imported goods. To be sure, stevedoring activity, or for that matter any other activity connected with the importation or exportation of goods, could be singled out for special tax treatment amounting to a tariff or preference, but that is simply not the case with Washington's B&O tax under consideration by this Court. In short, Washington's B&O tax as applied to Stevedores does not amount to state regulation of foreign commerce.

Does Washington's B&O tax as applied to stevedoring activity deprive the United States of the exclusive right to all revenues from imposts and duties on imports and exports? Again, we think not. There is no question but that Washington's B&O tax on stevedoring activities *may* increase the cost of importing and exporting goods. But a general, nondiscriminatory state tax imposed to support the governmental services rendered to importers and their contractors has never been thought to be within the prohibition of the Import-Export Clause. As stated by the Court in *Michelin, supra*:

> "The Import-Export Clause clearly prohibits state taxation based on the foreign origin of the

> imported goods, but it cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies. See, *e.g.*, *May v. New Orleans*, 178 U. S. 496, 502-504, 507-509 (1900). It may be that such taxation could diminish federal impost revenues to the extent its economic burden may discourage purchase or importation of foreign goods. The prevention or avoidance of this incidental effect was not, however, even remotely an objective of the Framers in enacting the prohibition." 403 U.S. at 276.

Does Washington's B&O tax interfere with the free flow of goods among the states? Stated otherwise, is Washington's B&O tax a mere "transit fee"? Still again, we think not. The tax in question is nondiscriminatory and is not directed at imports or exports as such. It is apportioned exactly to those activities which take place in the State of Washington and does not reach activities taking place elsewhere. Indeed, Washington's B&O tax has exactly the same effect on the process of importing and exporting as Maryland's gross receipts tax on the transportation of goods moving in the import-export stream upheld by this Court in *Canton Ry. Co. v. Rogan*, 340 U.S. 511 (1951).

As stated by this Court in *Michelin:*

> "There is no reason why local taxpayers should subsidize the services used by the importer; ultimate consumers should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation

costs associated with those goods." 423 U.S. at 289.

In short, Washington's B&O tax on stevedoring activity does not, and cannot, interfere with the free flow of goods among the states. It is a tax on a wholly local activity; the funds derived therefrom are used to provide governmental services to the Stevedores; and there is not a scintilla of evidence that the tax is designed as a "transit fee" for goods moving through Washington.

Thus, notwithstanding the fact that Justices Douglas and Rutledge in their dissent in *Joseph v. Carter & Weekes Stevedoring Co., supra*, would have held New York's tax on stevedores to be in violation of the Import-Export Clause[27] it is apparent Washington's B&O tax on stevedoring activity does not violate the Import-Export Clause. The tax is not an "impost" or "duty" within the meaning of the Import-Export Clause; it does not produce any of the effects on importing and exporting forbidden by the Import-Export Clause; and accordingly should be sustained.

CONCLUSION

The issue before the Court is whether the Commerce or Import-Export Clause prohibits a general, nondiscriminatory state tax on the privilege of engaging in the business of stevedoring cargo moving

[27]It appears that Justice Douglas may have reconsidered his position only five years later. In his majority opinion in *Canton Ry. Co., supra*, he specifically reserved the question of whether stevedoring activities are immune from gross receipts taxation by reason of the Import-Export Clause. 340 U.S. at 515, quoted *supra* at p. 36.

in interstate and foreign commerce. The Court has clearly indicated in *Michelin* and *Complete Auto Transit* that the proper analysis of questions posed by state taxation of interstate and foreign commerce turns on whether the state tax produces an effect forbidden by these two constitutional provisions, without regard to the type of "label" attached to the tax.

Washington's B&O tax produces none of the effects on interstate or foreign commerce forbidden by these two constitutional provisions, and consequently should be sustained. The "Stevedoring Cases," to the extent that they would invalidate the tax in question, should be overruled inasmuch as the cases represent outmoded methods of analysis and produce results never intended by the Framers of the Constitution.

In sum, interstate and foreign commerce should pay their way, and there is no reason why the states through which such commerce passes should be required to subsidize that commerce except insofar as necessary to prevent states from exacting an unfair tribute from goods and services passing through the state.

Accordingly, the petitioner State of Washington Department of Revenue respectfully requests this Court to reverse the decision of the court below; uphold the constitutional validity of the challenged administrative rule; and thereby uphold the power of

the State of Washington to apply its Business and Occupation Tax to the wholly in-state activities of the Stevedores.

Respectfully submitted,

SLADE GORTON
Attorney General
State of Washington
RICHARD H. HOLMQUIST
Senior Assistant Attorney General
MATTHEW J. COYLE
Assistant Attorney General
Attorneys for Petitioner.

APPENDIX A

82.04.220 Business and occupation tax imposed. There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

82.04.290 Tax on other business or service activities. Upon every person engaging within this state in any business activity other than or in addition to those enumerated in RCW 82.04.230, 82.04.240, 82.04.250, 82.04.255, 82.04.260, 82.04.270, 82.04.275 and 82.04.280; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one percent. This section includes, among others, and without limiting the scope hereof (whether or not title to materials used in the performance of such business passes to another by accession, confusion, or other than by outright sale), persons engaged in the business of rendering any type of service which does not constitute a "sale at retail" or a "sale at wholesale." The value of advertising, demonstration, and promotional supplies and materials furnished to an agent by his principal or supplier to be used for informational, educational and promotional purposes shall not be considered a part of the agent's remuneration or commission and shall not be subject to taxation under this section.

82.04.460 Business within and without state—— Apportionment. Any person rendering services and maintaining places of business both within and without this state shall, for the purpose of computing tax liability under this chapter, apportion to this state that portion of his gross income which is derived from services rendered within this state. Where such apportionment cannot be accurately made by separate accounting methods, the taxpayer shall apportion to this state that proportion of his total income which the cost of doing business within the state bears to the total cost of doing business both within and without the state.

APPENDIX B

STATE OF WASHINGTON
DEPARTMENT OF REVENUE
Olympia, Washington

WAC 458-20-193D (Rule 193—Part D)

TRANSPORTATION, COMMUNICATION, PUBLIC UTILITY ACTIVITIES, OR OTHER SERVICES IN INTERSTATE OR FOREIGN COMMERCE

Rule 193 deals with interstate and foreign commerce and is published in four separate parts:

Part A. Sales of Goods Originating in Other States to Persons in Washington.

Part B. Sales of Goods Originating in Other States to Persons in Washington.

Part C. Imports and Exports: Sales of Goods from or to Persons in Foreign Countries.

Part D. Transportation, Communication, Public Utility Activities, or Other Services in Interstate or Foreign Commerce.

• • •

PART D.

BUSINESS AND OCCUPATION TAX, PUBLIC UTILITY TAX

In computing tax there may be deducted from gross income the amount thereof derived as compensation for performance of services which in themselves constitute interstate or foreign commerce to the extent that a tax measured thereby constitutes an impermissible burden upon such commerce. A tax does not constitute an impermissible burden upon interstate or foreign commerce unless the tax discriminates against that commerce by placing a burden thereon that is not borne by intrastate commerce, or unless the tax subjects the activity to the risk of repeated exactions of the same nature from other states. Transporting across the state's boundaries is exempt, whereas supplying such transporters with facilities, arranging accommodations, providing funds and the like, by which they engage in such commerce is taxable.

EXAMPLES OF EXEMPT INCOME:

1. Income from those activities which consist of the actual transportation of persons or

property across the state's boundaries is exempt.

2. That portion of commissions received by local brokers or commission merchants for interstate or foreign sales which was paid to out-of-state independent agents is exempt.
3. Income from services rendered by an out-of-state branch or office of the taxpayer regularly maintained outside the state is exempt. (See Rule 194.)

EXAMPLES OF TAXABLE INCOME:

1. Compensation received by persons engaged in business within this state for performance of business activities which are only ancillary to transportation across the state's boundaries is taxable.
2. Compensation received by merchandise brokers or commission merchants for services rendered within this state to principals engaged in interstate or foreign commerce is taxable.
3. Compensation received by contracting, stevedoring or loading companies for services performed within this state is taxable.

In computing public utility tax, there may be deducted from gross income so much thereof as is derived from actually transporting persons or property or transmitting communications or electrical energy, from this state to another state or territory or to a foreign country and vice versa.

Persons, including dock companies or wharfage companies, are permitted no deduction of gross income from services performed in this state consisting of the handling of cargo or freight even though such cargo or freight has moved or will move across the state's boundaries.

No deduction is permitted with respect to gross income derived from activities which are ancillary to transportation across the state's boundaries, such as income received by a wharf company or warehouse company for the storage of goods. The mere ownership or operation of facilities by means of which others engage in foreign or interstate commerce is an activity ancillary to such commerce and any income received therefrom is taxable.

Insofar as the transportation of goods is concerned, the interstate movement of cargo or freight ceases when the goods have arrived at the destination to which it was billed by the out-of-state shipper, and no deduction is permitted of the gross income derived from transporting the same from such point of destination in this state to another point within this state. Thus, freight is billed from San Francicso, or a foreign point, to Seattle. After arrival in Seattle it is transported to Spokane. No deduction is permitted of the gross income received for the transportion from Seattle to Spokane. Again, freight is billed from San Francisco, or a foreign point, to a line carrier's terminal, or a public warehouse in Seattle. After arrival in Seattle it is transported from the line carrier's terminal or public warehouse to the

buyer's place of business in Seattle. No deduction is permitted of the gross income received as transportation charges from the line carrier's terminal or public warehouse to the buyer's place of business in Seattle.

Revised May 3, 1974.

Supreme Court, U. S.
FILED
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FOR ARGUMENT

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1706

THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON,
Petitioner,

v.

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENTS

JOHN T. PIPER
MAX KAMINOFF
D. MICHAEL YOUNG
Counsel for Respondents

Office and Post Office Address:
BOGLE & GATES
2300 The Bank of California Center
Seattle, Washington 98164
Telephone (206) 682-5151

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1706

THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON,
Petitioner,

v.

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENTS

QUESTIONS PRESENTED

1. May the flat prohibition of the Import-Export Clause be abridged to permit an excise on the moving of imports and exports through a seaport—merely because the excise is apportioned and allegedly not designed to discriminate?

2. Under the Commerce Clause, may a state that has a "nexus" with an interstate carrier impose an excise on movement of goods through a seaport—merely because the tax is apportioned and allegedly not designed to discriminate?

STATEMENT OF THE CASE

A. & B. Nature of the Case; Parties.

Respondent is satisfied with Petitioner's description of the case and the parties.

C. Business of the Stevedores.

Respondent's petition to the Washington Superior Court pleaded at paragraph VI:

> "The private stevedoring companies that constitute the petitioner, Association of Washington Stevedoring Companies, are engaged in the same stevedoring activities that were held not taxable in *Puget Sound Stevedoring Co., supra*. Many of the members of petitioner, Washington Public Ports Association, are also engaged in such activities." (A. 5)

Petitioner expressly admitted that pleading. (A.7) Thus the facts of *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937), have been incorporated by reference and become the facts of the instant case.

In *Puget Sound*, this court recited the following pertinent facts:

> "Appellant . . . is engaged in the general stevedoring business at Seattle and at other ports on Puget Sound. . . .
>
> . . . .
>
> " 'Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class "as clearly identified with maritime affairs as are the mariners." '
>
> . . . .
>
> "What was done by this appellant in the business of loading and unloading was not prolonged beyond the stage of transportation and its reasonable incidents. . . . It took in the work of carriage to and from the 'first place of rest,' which means that it covered the space

> between the hold of the vessel and a convenient point of discharge upon the dock. . . . [N]o matter by whom the work is done or paid for, 'stevedoring services . . . always commence in the hold of the vessel and end at the "first place of rest," and vice versa.' . . . The movement is continuous, is covered by a single contract, and is necessary in all its stages if transportation is to be accomplished without unreasonable impediments." 302 U.S. at 91-93.

The line drawn by *Puget Sound* defining the extent of the water carriers' responsibility for cargo ("place of rest" of the cargo), comports with the responsibility of such carriers under maritime common law, federal statutes and international agreements governing the carriage of goods by sea. *See* part IV, *infra*.

D. Nature of the Tax.

Petitioner concedes that the instant tax "is virtually the same tax considered by this court in *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937)." (Pet. Br. pp. 4-5). We believe Petitioner will agree that the two taxes are *identical* in all respects material to the issues of this case. (*See* A. 4-7).

Petitioner characterizes the instant tax as a "general" business and occupation tax that "reaches virtually every form of business activity conducted in [the] state." (Pet. Br. pp. 4, 5). In fact, an occupation accounting for one of the larger portions of the state's gross product (farmers) is exempt. *See* Wash. Rev. Code § 82.04.330 (Appendix A); Appendix B to this brief. "The tax" on such businesses and occupations as have been selected to pay is actually a multitude of excises having varying bases and rates. The excises organized into two groups—one called a "business and occupation tax" (contained in Wash. Rev. Code ch. 82.04)

and the other called a "public utility tax" (contained in Wash. Rev. Code ch. 82.16). There are more than a dozen different rates. Railroads and express companies, for example, pay 360 times the rate applicable to wholesalers of grains and dried peas. *See* Wash. Rev. Code §§ 82.16.020, 82.04.260 (set forth in Appendix A to this brief). The influences of political considerations on the tax are apparent. (In that respect, see also Wash. Rev. Code § 82.04-.430(11), exempting interest received on residential mortgage obligations, the burden of which would otherwise fall on homeowners.)

SUMMARY OF ARGUMENT

The instant tax is imposed on the handling of imports and exports passing through a seaport jurisdiction—including those bound to and from inland states. A tax imposed at the point of passage by a seaport or other taxing jurisdiction controlling a gateway of commerce is uniquely capable of operating as a "transit fee" or toll burdening the citizens of less favorably situated states. Consumers of inland states are burdened because the fees will be included in the cost of the imports they consume. Producers in such states are burdened by the fees because their exports are made less competitive. The seaport or other gateway taxing jurisdiction can, without varying tax rates from those charged its own citizens, enjoy an enormous broadening of its tax base at the expense of non-residents—a fact which tends to remove the political restraints that normally operate on taxes.

The Constitutional draftsmen sought to combat a "transit fee" problem by adoption of the Import-Export Clause, which Petitioner concedes "contains a flat prohibition forbidding the states to impose imposts or duties on imports or

exports." This Court has held that duties include excises and has steadfastly resisted invitations to abridge the express prohibition of the Import-Export Clause. This Court has refused, for example, to limit the Clause's application to only those imposts or duties that are intended to discriminate against imports or exports. Further, this Court has adopted a pragmatic application of the Clause to prohibit certain excises on the importers and the carriers of imports and exports—where such taxes may have the same economic effect as a tax on the goods themselves.

In construing the Commerce Clause, this Court, like the Constitutional draftsmen of the Import-Export Clause, has evidenced a concern with the "tollgate syndrome". Movement of goods has been recognized as so fundamental to commerce that it has received special protection. The goods themselves are protected from tax while in the stream of commerce no matter how deeply a state may be penetrated. Further, this Court has recognized, as it has under the Import-Export Clause, that an excise imposed on a carrier can have the same economic effect as a tax imposed on the goods themselves. Interstate carriers, including water carriers, have been protected from carriage excises extending to the points where their carriage duties begin and end. By contrast, *intra*state carriers are not protected from excises. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the case chiefly relied upon by Petitioner under the Commerce Clause, is the most recent of a long line of cases permitting an excise on the *intra*state carrier. Such an excise does not normally risk the tollgate syndrome because its burden tends to fall principally, if not exclusively, on local residents. (An excise on local transit in the destination state, for example, falls only on local consumers.) It is to be dis-

tinguished from an excise imposed on the passage of goods through a commerce gateway where the burden falls on citizens of other states. The century-long history of this Court's decisions under the Commerce Clause reflects a clear distinction between cases involving the *movement* of goods and the quite different cases involving interstate *transactions* (sales, advertising and commissions), such as *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938) (the case which first enunciated the principles relied on by Petitioner). The rhetoric from *transactional* cases should be applied to cases involving transit through commerce gateways with great care. All the cases decided by this Court under the Commerce Clause prior to 1938 (when *Western Live Stock* was decided) involved transportation or communication. There is a pragmatic wisdom in many of their holdings, as applied to excises imposed at commerce gateways, despite some language that may sound formalistic when applied to the transactional cases that began to appear in recent decades.

A tax on stevedoring is an ideal means of imposing the type of transit fee (imposed at the expense of less favorably situated states) feared by the Constitutional draftsmen and this Court. In the second stevedoring case, *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947), this Court struck down such a tax after having a decade to reflect on the principles enunciated in *Western Live Stock* and relied upon here by petitioner. This Court further struck down an analogous tax in *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157 (1954) after even more reflection. The stevedoring decisions not only protect against a tollgate syndrome, but comport with the lines that define the responsibility of water carriers in other fields of law, in-

cluding maritime common law, federal statutes and international agreements.

ARGUMENT

I. Introduction.

Petitioner repeatedly characterizes its basic theme as a triumph of a "pragmatic," "practical" or "economic" approach over approaches previously taken by this Court. (Pet. Br. pp. 16, 18, 30, 38).

Respondents embrace a "pragmatic" approach; but we add three refinements that we believe are fundamental to this case.

First, excises imposed on certain types of *movement* in commerce create the danger of what we will term here the "tollgate syndrome." By that term we mean that a seaport or other taxing jurisdiction positioned astride an avenue of commerce can impose "tolls" on residents of states less favorably situated. Without varying rates from those imposed on their own citizens, the favorably situated states can enjoy enormous increases in the tax base at the expense of increased burdens on non-citizens. Consumers in less favorably situated states are burdened because an excise imposed on any movement activity, whether it be importing, carriage, stevedoring or a like act, must be borne by those who consume the goods. Producers in such states can also be burdened because the "tolls" make their exports less competitive. The expansion of the tax base to non-citizens removes the political restraints that normally operate on taxes—hence the prospect of a "tollgate syndrome."

Second, the distinction between the Import-Export Clause (where pragmatism has, in fact, long been the rule)

and the Commerce Clause must be constantly kept in view.

Third, under the Commerce Clause, there is a distinction between cases involving *movement* and mere *transactional* cases like *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). That case, which enunciated the doctrine relied upon by Petitioner, involved sales of magazines and advertising. The distinction between such cases and cases involving movement has long been implicit in the decisions of this Court. Soon after *Western Live Stock*, a leading scholar of the day speculated about the likely impact of the doctrine that decision had spawned.[1] Although he believed the impact could be far-reaching (and erroneously seemed to expect Mr. Justice Frankfurter to be in the vanguard of those leading the way to change), he did make note of an important fact that has escaped the attention of Petitioner:

> "May it be significant, however, that *all the recent opinions which gave rise to this practical approach involved taxes measured by gross receipts from sales, advertising, and commissions on sales?* Such taxes make evident at once the unfair competitive advantage which would result from exempting the interstate transaction from taxes borne by local transactions of the same character. *On the other hand, all the cases which prior to 1938 developed and applied the formal rule against taxing gross receipts from interstate commerce were concerned with receipts from transportation and communication.* Is this a mere chronological accident?" Lockhart, *Gross Receipts Taxes on Interstate Transportation and Communication*, 57 Harv. L. Rev. 40, 42 (1943) (emphasis supplied).

It is the "tollgate syndrome," peculiar to *movement* cases, that justifies the distinction. The wisdom of some 100 years of decisions protecting movement in commerce should not

1. Lockhart, *Gross Receipts Taxes on Interstate Transportation and Communication*, 57 Harv. L. Rev. 40, 42 (1943).

be lightly cast aside. The *transactional* cases, such as *Western Livestock*, may be recognized as a different genre and their rhetoric should be applied to movement cases only after careful thought about the economic consequences.

II. The Express Prohibition of the Import-Export Clause Precludes Imposing the Instant Tax If Either the Ordinary Meaning of the Clause or Its Purpose Are Given Effect.

A. *The Import-Export Clause Is a Flat Prohibition Against State Excises on Imports and Exports and Its Plain Meaning May Not Be Abridged by the Implied Qualification Advanced By Petitioner.*

The Import-Export Clause of the United States Constitution (art. I, § 10, cl. 2), provides in pertinent part:

> "No state shall, without the Consent of the Congress lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws . . . ."

The flat prohibition of the Clause could hardly have been more plainly stated. Petitioner, in fact, acknowledges the "significant differences" between the Import-Export Clause and the implied prohibition of the Commerce Clause (U.S. Const. art. I, § 8, cl. 3):

> "The Commerce Clause is cast in terms of a grant of power to Congress to regulate foreign commerce. The Import-Export Clause, on the other hand, contains a flat prohibition forbidding the states to impose imposts or duties on imports or exports. See *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946)." (Pet. Br. pp. 32-33).

The impact of that flat prohibition (and the distinction between it and the lesser prohibition of the Commerce

Clause) was emphatically demonstrated in one of the two cases directly in point with the instant case. *See Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947). In that case, a stevedoring tax was struck down under the Commerce Clause by a majority, but there were four dissents. However, two of the dissenters joined with the majority in striking down the tax under the Import-Export Clause, explaining:

> "[S]ince the Commerce Clause does not expressly forbid any tax, the Court has been free to balance local and national interests. . . . But the Import-Export Clause is written in terms which admit of no exception but the single one it contains. Accordingly a state tax might survive the tests of validity under the Commerce Clause and fail to survive the Import-Export Clause. For me the present tax is a good example." 330 U.S. at 445.

Despite Petitioner's seeming acknowledgment of the greater force of the Import-Export Clause prohibition (as compared to that of the Commerce Clause), Petitioner fails to deal with the distinction in its argument. Its argument under the Import-Export Clause is essentially a repetition of what it has said under the Commerce Clause. Petitioner argues as though any tax should be sustained under both clauses provided only there is "nexus," apportionment, and a lack of a designed discrimination.

This Court has already put such a notion to rest in a case cited with apparent approval by Petitioner, *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946). There this Court carefully explained the differences between the two clauses, and expressly rejected the suggestion that lack of designed discrimination will save a tax otherwise falling under the prohibition of the Import-Export Clause.

We quote at length because the point is fundamental to this case:

> "We do not pursue the inquiry as to the validity of the tax under the Commerce Clause. For we are of the view that whatever might be the result of that inquiry, the tax is unconstitutional under Article 1, § 10, Clause 2.
>
> "The two constitutional provisions, while related, are not coterminous. To be sure, a state tax has at times been held unconstitutional both under the Import-Export Clause and under the Commerce Clause. [Citations omitted.] But there are important differences between the two. The invalidity of one derives from the prohibition of taxation on the import or export; the validity of the other turns nowise on whether the article was, or had ever been, an import or export. [Citations omitted.] Moreover, the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce. . . . [T]he law under the Commerce Clause has been fashioned by the Court in an effort 'to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed.' That accommodation has been made by upholding taxes designed to make interstate commerce bear a fair share of the cost of the local government from which it receives benefits. . . .
>
> "*It seems clear that we cannot write any such qualifications into the Import-Export Clause.* It prohibits every State from laying 'any' tax on imports or exports without the consent of Congress. Only one exception is created—'except what may be absolutely necessary for executing its inspection Laws.' The fact of a single exception suggests that no other qualification of the absolute prohibition was intended. *It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against 'any' tax a prohibition against 'any discriminatory' tax* . . . But the two clauses, though complementary, serve

different ends. And the limitations of one cannot be read into the other.

"*It is suggested, however, that the history of the Import-Export Clause shows that it was designed to prevent discriminatory taxes* and not to preclude the levy of general taxes applicable alike to all goods . . . *The qualified interpretation urged upon us has therefore no substantial support in the history of the Import-Export Clause. Moreover, to infer qualifications does not comport with the standards for expounding the Constitution.* As stated by Chief Justice Marshall in Sturges v. Crowinshield, 4 Wheat. (US) 122, 202, 4 L ed 549, 550, 'it would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation.' For, as Chief Justice Taney said in Holmes v. Jennison, 14 Pet. (US) 540, 570, 571, 10 L ed 579.

> 'In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the Constitution have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning.'

We cannot, therefore, read the prohibition against 'any' tax on exports as containing an implied qualification." 329 U.S. at 75-78 (emphasis supplied).

That the prohibition is not limited to "discriminatory" imposts or duties is evident not only from the Constitutional language but is established by this Court's application of the Clause. For example, the tax struck down in *Richfield Oil Corp., supra,* was general and non-discriminatory, both

in form and operation.[2] It was imposed at a uniform rate on retailers generally.[3] There was no discrimination between sales made locally and those in foreign commerce. This Court recognized that the Constitution prohibits the application to imports and exports of even such a general, uniform excise:

> "*The prohibition contained in the Import-Export Clause against taxation on exports clearly involves more than a mere exemption from taxes laid specifically upon the exported goods themselves.* That is true of the constitutional prohibition against federal taxes on exports. United States v. Hvoslef, 237 US 1, 59 L ed 813, 35 S Ct 459, Ann Cas 1916A 286, supra. What was said there (p 13) is equally applicable here: 'If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction but in effect overriding it.' [Citation omitted.]" 329 U.S. at 85 (emphasis supplied).

No more articulate statement of the imperative of the Import-Export Clause can be fashioned than this Court has already made. That it would be "dangerous in the extreme

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2. By contrast, Washington's B & O tax, although asserted by Petitioner to be general and nondiscriminatory, is neither general to all businesses and occupations, nor uniform in rate.

3. See ch. 36, § 1 [1941] Cal. Laws 533, 536, codified as Cal. Rev. & Tax Code §§ 6006, 6051, 6052. This Court accepted the characterization of the tax by the state supreme court:

> "The California Supreme Court held that the tax is an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales; that it is not laid upon the consumer and does not become a tax on the sale or because of the sale. 27 Cal2d p 152, 163 P2d p 2.
>
> "That construction, being a matter of state law, is binding on us. But it is not determinative of the question whether the tax deprives the taxpayer of a federal right. That issue turns not on the characterization which the state has given the tax, but on its operation and effect." 329 U.S. at 83-84.

to infer from extrinsic circumstances"[4] a case for abridgment of the Clause's plain command is a principle already recognized by this Court.

B. *This Court Has Applied a Pragmatic Approach to Strike Down Attempts to Levy "Transit Fees" on Imports and Exports By Indirection.*

Petitioner repeatedly urges upon this Court, both under the Import-Export Clause and the Commerce Clause, a "pragmatic approach" that focuses on the "practical effects" of a tax. Respondents embrace that approach. So has this Court by its decisions under the Import-Export Clause.

Not only has this Court refused to abridge the plain language of the Import-Export Clause, but it has also pragmatically applied the Clause to strike down indirect violations of its principles.

As a means of giving the Import-Export Clause the scope that its principles require, this Court has consistently recognized that excises are among the "imposts or duties" proscribed.[5]

A landmark case under the Import-Export Clause is *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827). That case involved a tax arguably two steps removed from a

4. 329 U.S. at 77.

5. In *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), chiefly relied upon by Petitioner on the Import-Export issue, this Court said: "'Duties' was a broader term embracing excises as well as customs duties . . . ." 423 U.S. at 291. Many prior decisions striking down excises under the Import-Export Clause confirm the inclusion of excises within the constitutional prohibition. See, e.g., *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827); *Almy v. California*, 65 U.S. (24 How.) 169 (1861); *Cook v. Pennsylvania*, 97 U.S. 213 (1878); *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292 (1917); *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218 (1933); *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946); *Department of Revenue v. James Beam Distilling Co.*, 377 U.S. 341 (1964).

duty on imported goods—a tax imposed on the importer rather than the goods themselves, and on the privilege of selling rather than the privilege of importing. This Court, taking into account all three of the purposes of the Clause cited by Petitioners (in reliance on *Michelin Tire Corp. v. Wages, supra*), looked to the practical economic affects of the tax and reasoned:

> "If we quit this narrow view of the subject, and passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation.
>
> "[I]t is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other." 25 U.S. at 438-39.
>
> . . . .
>
> "It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. . . ." 25 U.S. at 444.

In *Almy v. California*, 65 U.S. 169 (1861) this Court struck down an excise that was arguably less directly upon imports than that in *Brown v. Maryland*. The excise in *Almy* was not imposed upon the imported goods or even the importer, but upon the bill of lading issued by the carrier. This Court explained:

> "But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; . . . A bill of lading, therefore, or some equivalent instrument of writing, is in-

variably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported." 65 U.S. at 174.

Other taxes also not imposed directly on the imported goods, have similarly been struck down where their effect was tantamount to a tax on the imported goods. Several examples were recited in the *Richfield Oil Corp.* decision:

> "Thus a *federal stamp tax on a foreign bill of lading is a tax on exports, since it is the equivalent of a direct tax on the articles* included in the bill of lading. Fairbank v. United States, 181 US 283, 45 L ed 862, 21 S Ct. 648. *The same is true of federal stamp taxes on charter parties* made exclusively for the carriage of cargo in foreign commerce, United States v. Hvoslef, 237 US 1, 17 . . . *For a tax on those charter parties is 'in substance of a tax on the exportation; and a tax on the exportation is a tax on the exports. The same is likewise true of federal stamp taxes on policies insuring exports* against maritime risks. Thames & M. M. Ins. Co. v. United States, 237 US 19, 59 L ed 821, 35 S Ct 496, Ann Cas 1915D 1087. The Court stated, p 27:
>
> > 'The rise in rates for insurance as immediately affects exporting as an increase in freight rates, *and the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. . . .'"
>
> 329 U.S. at 80 (emphasis supplied).

The *Fairbank, Hvoslef* and *Thames* cases cited in *Richfield* involved *federal* taxes struck down by this Court under U.S. Const., art. I, § 9, cl. 5. That constitutional provision—prohibiting federal taxes or duties on exports—is closely analogous to the Import-Export Clause. As the Court observed in *Brown v. Maryland*:

> "The states are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any state. *There is some diversity in language, but none is perceivable in the act which is prohibited. . . .*" 25 U.S. at 445 (emphasis supplied).

The Court recognized in *Hvoslef* that:

> "This constitutional freedom however, plainly involves *more than mere exemption from taxes or duties which are laid specifically upon the goods themselves.* If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction, but in effect overriding it. It was the clear intent of the framers of the Constitution that 'the *process of exporting* the products of a state, the goods, chattels, and property of the people of the several states, should not be obstructed or hindered by any burden of taxation. Miller, Const. p. 592." 237 U.S. at 13 (emphasis supplied).

In *Fairbank*, the Court endorsed "the great principle that what cannot be done directly because of constitutional restriction cannot be acomplished indirectly by legislation which accomplishes the same result." 181 U.S. at 294. The Court also stated and applied a related principle:

> "[N]o legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed. If, for instance, Congress may place a stamp duty of 10 cents on bills of lading on goods to be exported, it is because it has power to do so; and if it has power to impose this amount of stamp duty it has like power to impose any sum in the way of stamp duty which it sees fit. And it needs but a moment's reflection to show that thereby it can as effectually place a burden upon exports as though it placed a tax directly upon the articles exported. It can, for the purposes of revenue, receive just as much as though it placed a duty directly upon the articles, and it can just as fully restrict the free exportation which was one of the purposes of the Constitution." 181 U.S. at 290-91.

The same dangers inhere, we submit, in the instant tax on stevedores handling imports and exports.

Appellant places its reliance on *Michelin Tire Corp. v. Wages, supra*, a recent property tax case decided by this Court. In *Michelin*, 423 U.S. at 290, this Court recognized that the Clause prohibits "transit fees," citing the *License Cases*, 46 U.S. (5 How.) 504 (1847). The *License Cases*, in fact, provide an articulate distinction between the tax in *Michelin* (a *property* tax levied on the mass of goods in the state), and a tax on the thing imported, while it remains a part of commerce (such as the excises that have been struck down by this Court under the Import-Export Clause):[6]

> "Undoubtedly a State may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consists of money engaged in trade, or of imported goods which he proposes to sell, or any other property of which he is the owner. But a tax of this description stands upon a very different footing from the tax on the thing imported, while it remains a part of foreign commerce, and is not introduced into the general mass of property in the State. . . ." 46 U.S. at 576.

6. In the *License Cases*, six Justices produced nine separate opinions, but appeared to reach a consensus that the goods in all three cases were taxable because they were no longer imports, having been incorporated into the mass of property in the state. Several Justices also grounded their conclusion on the police power of states because of the type of goods involved ("ardent spirits"). The case of *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), relied on by Petitioner as though it were an ordinary tax case (Pet. Br. pp. 36-37), also involved an exercise of police power. A statutory penalty was imposed on a vessel master for failure to observe a safety requirement that a pilot be aboard.

C. *The Instant Tax Is a Classic Example of a Toll or "Transit Fee" Prohibited By the Import-Export Clause, Which Falls Upon Non-Citizens of the State and Lends Itself to Even Further Abuse.*

Analysis will show, we believe, that Washington's tax on stevedores operates as a "toll" on the citizens of inland states. Citizens of Washington provide the "base" of the tax only to the extent that goods originate in or are destined for that state. The rest of the tax base is provided by non-citizens. Further, that existing abuse is potentially expandable—by an increase in the tax rate. We will elaborate on this point after first reviewing what Petitioner said in defense of the tax under the Import-Export Clause.

When reduced to its essentials, Petitioner's argument under the Import-Export Clause is a repetition of its argument under the Commerce Clause (dealing with nexus, apportionment and lack of designed discrimination), plus a bald assertion that the instant tax is not a "transit fee." (Pet. Br. pp. 40-41). Petitioner's argument against a "transit fee" characterization of the instant tax is supported by circular reasoning:

> "Stated otherwise, is Washington's B&O Tax a mere 'transit fee'? Still again, we think not. The tax in question is nondiscriminatory and is not directed at imports or exports as such. It is apportioned exactly to those activities which take place in the State of Washington and does not reach activities taking place elsewhere. . . ." (Pet. Br. p. 41).

Thus, although purporting to ask and answer a *new* question, Petitioner's "transit fee" argument circles back to where it began, i.e., Petitioner's Commerce Clause argument. Petitioner, in short, asserts that the instant tax is not a "transit fee"—despite being imposed on the moving

of goods through a seaport—because it is apportioned and nondiscriminatory. Again, the *License Cases, supra*, articulate the flaw in Petitioner's reasoning:

> "A tax in any shape upon imports is a tax on the consumer, by enhancing the price of the commodity. And if a State is permitted to levy it in any form, *it will put it in the power of a maritime importing State to raise a revenue for the support of its own government from citizens of other States, as certainly and effectually as if the tax was laid openly and without disguise as a duty on imports.* Such a power in a State would defeat one of the principal objects of forming and adopting the Constitution. *It cannot be done directly,* in the shape of a duty on imports, for that is expressly prohibited. *And as it cannot be done directly, it could hardly be a just and sound construction of the Constitution which would enable a State to accomplish precisely the same thing under another name, and in a different form.*" 46 U.S. at 576 (emphasis supplied).

The foregoing statement of this Court focuses the vice of the instant tax, considered in the light of the Import-Export Clause purposes. In a word, the tax operates as a "toll" (or "transit fee"). *Even assuming a rate that is uniform throughout the taxing jurisdiction,* it is apparent that a seaport or other gateway of commerce can broaden its tax base at the expense of non-citizens. Seaport jurisdictions hardly need the assistance of economists to appreciate that the burden of a tax on their own citizens is more than compensated for when the base of the tax is broadened by forcing non-citizens to bear it. That was precisely what the Constitutional draftsmen sought to prevent. As this Court recognized in *Michelin*:

> "An evil to be prevented by the Import-Export Clause was the levying of taxes which could only be imposed because of the peculiar geographical situation of certain States that enabled them to single out goods destined for other States." 423 U.S. at 289-90.

By their nature, imports and exports passing through seaports involve stevedores. Whatever may be the intent of Petitioner's proposed new rule taxing stevedores, it has the economic affect of "singling out" water-carried imports and exports.

In short, a tax on the movement of imports and exports through a seaport is uniquely susceptible to the imposition of a "toll" on citizens of states less favorably situated. A uniform rate of tax spread among several states or a multitude of states so broadens the tax base that normal political restraints are apt to be lost or diluted. The Constitutional fathers saw that threat and dealt with it in unmistakable language. It would be dangerous doctrine for this Court to depart from its earlier positions and limit the scope of the Import-Export Clause, merely because a state alleges that it intended no discrimination.

Further, it is meaningless for Petitioner to speak, in this context, of apportionment or nondiscrimination. We have already noted that the base of the tax (gross receipts of the stevedores) is expanded by reason of goods handled that are produced by, or destined for, citizens of inland states. Additionally, because the tax is a multiple of its rate times its base, account must be taken of the infinite flexibility allowed the seaport state in fixing the rate. Petitioner speaks of the instant tax as a "general" tax, yet one of the largest groups of producers of gross product in the state (farmers) do not pay it. *See* Wash. Rev. Code § 82.04.330 (Appendix A); Appendix B to this brief. Among those who do pay, there is a wide variance in rates; railroads and express companies, for example, paying 360 times the rate applicable to wholesalers of grains and dried peas. *See* Wash. Rev. Code §§ 82.16.020, 82.04.230-.290.

Finally, we think it fair to say that Petitioner, with its emphasis on the "pragmatic approach to the Import-Export Clause" over the "direct-indirect" inquiry, will not seriously argue that the instant tax is not a tax on imports and exports—merely because it is not imposed directly on the importer or exporter. It would be truly a paradox if Petitioner, which advocates jettisoning the "direct-indirect" approach (under both the Import-Export Clause and the Commerce Clause), should resort to that approach in defense against the prohibition of the Import-Export Clause. Candor requires Petitioner to concede the validity of this Court's conclusion in *Brown v. Maryland, supra*, that a tax on the importer is tantamount to a tax on the imported goods. A like candor requires an admission that a tax on the *mover* of the goods is also tantamount to a tax on the goods themselves.[7]

A pragmatic view of the tax on stevedores should further yield a concession by Petitioner that the performance of stevedoring "wholly within the territorial limits of Washington" (Pet. Br. p. 4) misses the "tollgate" point. As this Court pointed out in *Brown v. Maryland*:

> "[I]t is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed as by a power to tax it while entering the port." 25 U.S. at 439.

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7. The tax this Court struck down in *Almy v. California*, 65 U.S. 169 (1861), was an excise on the carrier. There is an indication in Petitioner's brief, however, that it has been sorely tempted to employ the "direct-indirect inquiry" in defense of its position under the Import-Export Clause. Petitioner admits that Wash. Rev. Code § 82.04.500 makes the stevedore tax an item of "overhead." (Pet. Br. p. 23). Incredibly, however, Petitioner denies that the tax will be passed on by the stevedore to the carrier and importer. As a matter of elementary business economics, any business must ask its customers to bear its costs as well as provide an acceptable return on invested capital.

Tollgates typically lie within the boundaries of the taxing jurisdiction, but that does not mitigate their potential for harm. The instant tax cannot be distinguished, if one is concerned with practical or economic affects, from the taxes struck down by this court because laid directly on the importer.

In summary, this Court should not adopt the dangerous precedent of limiting the express prohibition of the Import-Export Clause to save a tax which would operate—if applied to stevedores—to expand its base to non-citizens of the state. The plain language of the Constitutional draftsmen should not be abridged—particularly under circumstances where this Court is unable to conclude with certainty that impediments to commerce feared by those draftsmen cannot occur.

III. The Existing Protection Afforded Movement of Goods and Persons Under the Commerce Clause Should Be Continued Because Apportionment of Taxes and the Rule Against Discrimination Do Not Provide Adequate Safeguards.

A. *Over 100 Years of Protection Afforded Movement of Goods and Persons Under the Commerce Clause Should Be Continued.*

The "toll gate syndrome" that the Constitutional draftsmen combated by the express prohibition of the Import-Export Clause has motivated this Court over the past century in construing the Commerce Clause. That syndrome is principally, if not exclusively, dangerous in cases involving *movement* of commerce.

A major defect of Petitioner's position is its failure to ob-

serve the difference in the decisions of this Court under the Commerce Clause between *movement* cases and *non-movement* cases.

Beginning with *Case of The State Freight Tax*, 82 U.S. (15 Wall.) 232 (1873), this Court has recognized that the movement of goods is fundamental to commerce. Movement has, therefore, received special protection.

Petitioner must concede that goods moving in interstate commerce enjoy protection from state property taxation—from the commencement of the journey to its end—as long as there is no unnecessary interruption or delay in the journey. *Champlain Realty Co. v. Brattleboro*, 260 U.S. 366 (1922); *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469 (1926); *Carson Petroleum Co. v. Vial*, 279 U.S. 95 (1929); *Minnesota v. Blasius*, 290 U.S. 1 (1933). The protection extends for the entire length of the journey no matter how deeply the state may be penetrated or how many carriers are involved.

Recognizing that an excise on the *mover* of the goods can be tantamount to a tax on the goods, *Brown v. Maryland, supra*, this Court supplemented protection of the goods with protection of carriers from excises on movement activity.

The protection of movement began with the *Case of The State Freight Tax, supra*, where the attempt was to tax the activity of moving freight in interstate commerce. The tax was struck down. The later case of *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U.S. 326 (1887), became the leading case condemning state taxes on gross receipts from that activity. Other cases in the line include

Fargo v. Michigan, 121 U.S. 230 (1887); *Galveston, Harrisburg & San Antonio Railway v. Texas*, 210 U.S. 217 (1908); *Meyer v. Wells Fargo & Co.*, 223 U.S. 298 (1912). The protection from excises on transport has continued to this day. *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157 (1954). It is because of this line of decisions that goods (and persons) can cross a continent without paying an excise to each state along the way.

The protection of interstate and foreign carriers from excises extends as far as their responsibility for the carriage goes. *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937); *Joseph v. Carter & Weekes Co.*, 330 U.S. 422 (1947); *Michigan-Wisconsin Pipeline Co. v. Calvert, supra*. Further, this court, in *Puget Sound Stevedoring Co.*, refused to draw a distinction between the interstate or foreign carrier loading and unloading through its own employees and a carrier acting through an independent contractor. Thus, where the interstate carrier in *Puget Sound* acted through stevedores in loading and unloading, this Court said:

> "No one would deny that the crew would be engaged in interstate or foreign commerce if busied in loading or unloading an interstate or foreign vessel. Cf. Baltimore & O. S. W. R. Co. v. Burtch, 263 U.S. 540, 68 L. ed. 433, 44 S. Ct. 165, 24 N.C.C.A. 42. The longshoreman busied in the same task bears the same relation as the crew to the commerce that he serves. Indeed, for the purposes of the Merchant Marine Act ([June 5, 1920] 41 Stat. at L. 988, 1007, chap. 250, 46 U.S.C.A. § 861), a stevedore is a 'seaman.'" 302 U.S. at 92.

Again, we would not expect Petitioner to disagree. It would surely be a return to the "direct-indirect" approach

that Petitioner condemns if a distinction were to be made between a carrier acting through its employees and one acting through independent contractors. In fact, Petitioner's brief makes clear that Petitioner makes no distinction between the carrier and its arm, the stevedore. Petitioner asserts the right under both the Commerce Clause and the Import-Export Clause to tax *anyone* "engaging in the business of transporting goods." (Pet. Br. pp. 13, 32).

The protection of the *mover* of goods, however, has been somewhat more limited geographically than the protection afforded the goods themselves. This Court has permitted an excise to be imposed on the *intrastate* carrier which links up with the interstate or foreign carrier to carry goods *locally*. In fact, in the *Puget Sound* case this Court expressly distinguished such a case as follows:

> "The situation thus presented has no resemblance to that considered in New York ex rel. Pennsylvania R. Co. v. Knight, 192 U.S. 21, 26, 48 L. ed. 325, 327, 24 S. Ct. 202, where an interstate railroad furnished its passengers with taxicab service to and from its terminus, the service being 'contracted and paid for independently of any contract or payment for strictly interstate transportation.'" 302 U.S. 93-94.

This Court has thereafter consistently made the same distinction. *Interstate Oil Pipeline Co. v. Stone*, 337 U.S. 662 (1949); *Canton Railroad Co. v. Rogan*, 340 U.S. 511 (1951); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). In *Interstate Oil* an intrastate railroad linking up with an interstate pipeline was subject to tax. In *Canton Railroad*, a local railroad operating entirely within the city of Baltimore and linking up with ocean and rail carriers was taxed. The same result occurred recently in *Complete Auto Transit* involving an intrastate automobile carrier.[8] Allowing excises on purely local carriers can be justified on the "pragmatic" grounds that Petitioner advocates. Such taxes do not afford the opportunity for fastening a "toll" on non-residents that excises on interstate carriers do. The tollgate syndrome does not operate because local producers or consumers bear the tax burdens laid on transit from one local point to another.[9]

Petitioner places its principal reliance upon *Complete Auto Transit*. Unquestionably, the language of that case, which includes the overruling of *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951), is sweeping enough to provide Petitioner encouragement. On its facts, however, *Complete Auto Transit* simply follows a long line of prece-

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8. See also *Central Greyhound Lines v. Mealey*, 334 U.S. 653 (1948). A tax on a journey beginning and ending in New York, and hence local, was struck down; but only because 43% of the journey was through Pennsylvania and New Jersey and the tax failed to exclude that portion of the journey from its base.

9. An excise imposed on the passage of goods from one point to another in the destination state falls on the consumer in that state. A like excise imposed between local points of the state of origin tends to be borne by the producers of that state whose goods become less competitive. Such local excises are in contrast to the excise imposed by a gateway jurisdiction on "through" passage because the base or measure of the tax is enlarged at the expense of non-residents. The tollgate syndrome may have prompted the reservation of opinion by Justices Jackson and Frankfurter in *Canton Railroad*. There the "local" carrier was the connecting link between ocean carriers and trunk-line rail carriers. While the case at first blush seems to fall within the rule permitting excises on local carriers, the linking by the Canton Railroad of foreign and interstate carriers may have justified the concern of the two Justices. A similar concern might be expressed for the holding of *Railway Express Agency v. Virginia*, 358 U.S. 434 (1959), although that decision was rationalized as an "in lieu of property tax" case consistent with a long line of decisions. The cases of *Memphis Gas Co. v. Stone*, 335 U.S. 80 (1948), and *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100 (1975), are saved from tollgate abuse by reason of the taxes involved there having been measured by capital employed in the state. Such taxes are subject to local political restraints similar to those operating on property taxes.

dent from this Court. (The tax involved in *Spector* might have been viewed as an income tax in substance, ineptly labeled as an excise on the privilege of doing an interstate carriage business.)

Because, as this Court recognized in *Brown v. Maryland, supra,* an excise on the mover of goods has the operative effect of a tax on the goods themselves, the protection against such excises must be continued if the protection of the goods is to survive.

B. *Apportionment Is Not an Adequate Alternative to the Protection Afforded Movement.*

Appellant appears to contend for a decision that would sweep away all the aforementioned precedent. We emphasize "all" because Petitioner contends that any tax on interstate movement of goods should be sustained provided only that it has "nexus," is not susceptible of multiple imposition and not designed to discriminate against interstate or foreign commerce. (Pet. Br. p. 13). To make that statement is tantamount to saying that any nondiscriminatory tax can be saved by apportionment. It is apportionment that would presumably allow, without "multiple imposition," the taxing of a coast-to-coast truck, train, bus or airplane journey by each of the myriads of taxing jurisdictions through which passage is made.

Petitioner neglects to note, however, that apportionment is a doctrine born of *non-movement* cases. *Western Live Stock* is generally cited as its genesis. *Western Live Stock* was a *transactional,* not a movement case. It involved the publishing and sale of a magazine. We refer again to the fact that all decisions invoking the *Western Live Stock*

doctrine have involved taxes measured by gross receipts from sales, advertising and commissions on sales; whereas, all cases which applied the so-called "formal" rule were concerned with receipts from transportation and communication.[10] Despite their "formal" language, many of the traditional transportation cases reflected a pragmatic concern for the threats to commerce that we attempt to describe in this section of our brief.

In short, the important distinction in this case may not be between "formalism" and "pragmatism," but rather between movement and transactional cases. It is taxes on movement which may, depending on the circumstances of the case, create a risk of a toll gate syndrome.

A related consideration is that transactional cases readily lend themselves to relatively simple apportionment. For example, in the typical sale there are only two points of contact, i.e., the point of origin and the place of the market. Apportionment might readily be made, therefore, between the state of origin and the state providing the market, so that the taxpayer would have to deal with only two taxing jurisdictions. In fact, however, this Court has elected to permit only *one* of the two states involved to tax.[11] The state of the *market* may tax.[12] The state of origin may

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10. Lockhart, *supra,* note 1. The fact that the transportation cases arose chronologically earlier than the transactional cases may create an impression that the former are outdated and superceded by the latter; whereas in fact their differences reflect the different problems they present.

11. *See* concurring opinion of Mr. Justice Rutledge in *Freeman v. Hewit,* 329 U.S. 249, 281-82 (1946).

12. *McLeod v. J. E. Dilworth Co.,* 322 U.S. 327 (1944); *Norton Co. v. Dept. of Revenue,* 340 U.S. 534 (1951); *Field Enterprises v. Washington,* 352 U.S. 806 (1956); *General Motors Corp. v. Washington,* 377 U.S. 436 (1964); *Standard Pressed Steel Co. v. Washington,* 419 U.S. 560 (1975).

not tax the interstate sale.[13]

It requires little imagination to perceive the burdens that are likely to result from sweeping away the protection this court has thus far afforded interstate and foreign movement. A journey from Seattle to Miami by truck, train, bus or airplane[14] may be exposed to the taxing jurisdiction of up to 10 states and a myriad of local jurisdictions. Their legislatures would hardly need economists at their sides to perceive that apportioned excises on the journey would fall on non-citizens of the taxing jurisdictions.

In short, to require apportionment and nondiscrimination in movement cases does not prevent states positioned astride commerce "gateways" from broadening their tax bases at the expense of non-citizens. By taking advantage of their geographic locations, such states can practice a form of discrimination too subtle for courts to deal with under existing precedent.[15]

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13. *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939); *Freeman v. Hewit*, *supra* note 11. The state of origin may, however, tax the act of extraction or production. *American Mfg. Co. v. St. Louis*, 250 U.S. 459 (1919) (manufacturing); *Hope Natural Gas Co. v. Hall*, 274 U.S. 284 (1927) (production of natural gas); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923) (mining). These cases, together with those allowing the market state to tax the interstate sale, produce the same overall effect as apportionment. The producer-seller may have to deal with two (but not more than two) states in an interstate transaction.

14. Taxing of journeys by airplane conceivably could be limited to jurisdictions where landings occurred; but that would require a tenuous distinction between traveling over ground and passing through a taxing jurisdiction's air space.

15. Soon after this Court approved a head tax on interstate airline passengers (on the basis that the proceeds were limited to the development and maintenance of the airport facility involved), *Airport Authority v. Delta Airlines*, 405 U.S. 707 (1972), a Senate Committee identified at least 31 jurisdictions that had rushed to enact various forms of head taxes. S. Rep. No. 12, 93d Cong., 1st Sess. (1973). The committee commented:

> "While this decision has invited state and local governments to enact head taxes or fees on air travelers, the court decision does not provide adequate safeguards to prevent undue or discriminatory taxation."

The tax in *Delta Airlines* avoided the "toll gate syndrome" by limiting its proceeds to development and maintenance of the airport facility—thus benefiting users of the airport in proportion to their use regardless of their place of residence. Congress evidently feared that other taxes would not provide the same proportional benefits. See, in this regard part III C, *infra*, discussing the limited utility of the rule against discrimination.

Further, the administrative burden of dealing with so many jurisdictions in movement cases may, alone, be a sufficient reason to sustain the protection heretofore afforded movement in commerce and to distinguish transactional cases.

Finally, in the absence of Congressional action, one may confidently expect differing rules of apportionment, with resulting complexities in compliance and the probability of overlapping taxes. Neither this court not the state courts have the resources to provide the refinement necessary to avoid such problems. The words of Mr. Justice Frankfurter in *Freeman v. Hewit*, *supra*, directed to this point, are pertinent:

> "Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce." 329 U.S. at 256.

C. *The Rule Against Discrimination Is Not an Adequate Alternative to Protection of Movement in Commerce.*

The rule against discrimination is not adequate for the task of protecting commerce because of the nature of the

excise. It is the most potent and dangerous weapon in the tax collector's arsenal. It can attach to activities of all kinds. The excise lacks the built-in political restraints that apply to property and income taxes which, if not required to be uniform, at least tend to be general with respect to individuals or corporations that populate the taxing jurisdiction.

The lack of built-in retraints on the excise are particularly dangerous when imposed at a gateway of commerce. The versatility of the excise makes it, in practice, virtually immune to charges of discrimination. Washington, for axample, has more than a dozen different tax rates for the privilege of doing business, with the top brackets paying 360 times the rate of the bottom. Wash. Rev. Code §§ 82.04.230-.290, RCW 82.16.020. This Court, in *Magnano Co. v. Hamilton*, 292 U.S. 40 (1934), permitted Washington to tax butter substitutes, reasoning that the obvious differences between butter and oleo margarine were enough to support separate tax classifications. Following this Court's lead, the Washington court has explained, "[T]here is no constitutional limitation upon the selection by the legislature of the subjects for excise tax so long as there is any reasonable basis for the classification whatsoever." *Gruen v. State Tax Commissioner*, 35 Wn.2d 1, 32, 211 P.2d 651, 669 (1949). More recently a tax on the operation of such recreational activities as golf, skating, skiing, pool and billiards has been approved while bowling was exempted. *Hemphill v. Tax Commissioner*, 65 Wn.2d 889, 400 P.2d 297 (1965). Even in interstate commerce the rule against discrimination has been effective mainly to curb legislation aimed at out-of-state drummers (*see, e.g., Robbins v. Taxing District of Shelby County, Tennessee*, 120 U.S. 489 (1887); *Nippert v. Richmond*, 327 U.S. 416 (1946)); and

has not necessarily been effective even for that purpose. *See Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537 (1969), where this Court upheld a tax on transient photographers.

In short, the rule against discrimination is too crude a tool for the task of coping with the subtleties of the excise.

D. *A Radical Change of Protection in the Field of Movement in Commerce Requires Congressional Rather Than Court Action.*

Taxation of movement in interstate commerce conditioned only on "nexus," apportionment and nondiscrimination would not only sweep away the two stevedoring precedents (the second set by this Court after a ten year interval for reflection), but would arguably call into question a myriad of other decisions as well. Certainly the case of *Michigan-Wisconsin Pipeline Co. v. Calvert, supra*, would be in jeopardy as well as earlier cases in that line of authority.[16]

Further, the reasoning of *Brown v. Maryland, supra*, that restrictions on taxation of the movers of goods is as necessary for protection of goods as restrictions on taxation of the goods themselves, suggests an even more radical sweeping away of precedent. If protection from excises on the transporters is eliminated, thus permitting states to reach the goods in that manner, there might be little utility remaining in the cases protecting goods moving in the stream

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16. For example, *Case of The State Freight Tax*, 82 U.S. (15 Wall.) 232 (1873); *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U.S. 326 (1887); *Fargo v. Michigan*, 121 U.S. 230 (1887); *Galveston, H & S. A. Ry. v. Texas*, 210 U.S. 217 (1908); *Meyer v. Wells Fargo & Co.*, 223 U.S. 298 (1912).

of commerce. By implication, these cases too might be swept away.[17]

Admittedly, the problem of protecting commerce in a complex economy, with the competing needs of commerce and the demands of states for revenue, has been a vexing one. The resulting mosaic of decisions has sometimes appeared as a "tangled underbrush" even to this Court (see Mr. Justice Clark's opinion in *Northwest States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959)); and has been criticized by a chorus to which Petitioner adds its voice by attacking the stevedore cases. However, Petitioner may not share the insight of the more astute critics—that the "tangle" is in large part attributable to the many and complex interrelationships among the Court's holdings which comprise this large body of law; that a piece-meal approach is likely to thicken the "tangle" or to wreak havoc with the highly integrated whole, by creating new uncertainties as to possible "new trends" in judicial thinking. Informed critics have long thought that improvement upon the body of law established by this Court should come from comprehensive Congressional consideration. *See McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 188-89 (1940) (Black, Douglas and Frankfurter, JJ., dissenting); *Northwest States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959) (Frankfurter, J., dissenting):

> "The problem calls for solution by devising a congressional policy. Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose the problem of the taxing freedom of the States and the needed limits on such state power. Congressional committees can make studies and give the claims of the individual States adequate hearing before the ultimate legislative formulation of policy is made by the representatives of all the States. The solution to these problems ought not to rest on the self-serving determination of the States of what they are entitled to out of the Nation's resources. Congress alone can formulate policies founded upon economic realities, perhaps to be applied to the myriad situation involved by a properly constituted and duly informed administrative agency." 358 U.S. at 476-77.

17. For example, *Champlain Realty Co. v. Brattleboro*, 260 U.S. 366 (1922); *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469 (1926); *Carson Petroleum Co. v. Vial*, 279 U.S. 95 (1929); *Minnesota v. Blasius*, 290 U.S. 1 (1933).

After more than a century of inactivity with respect to state taxation of interstate commerce, Congress responded within seven months of Justice Clark's comment in *Northwestern Cement, supra*, by passing Public Law 86-272. That law contains stopgap provisions restricting the states' power to tax income from the sale of goods in interstate commerce. *See* 15 U.S.C.A. § 381-84. More importantly in the present context, the law also provides:

> "Sec. 201. The Committee on the Judiciary of the House of Representatives and the Committee on Finance of the United States Senate, acting separately or jointly, or both, or any duly authorized subcommittees thereof, shall make full and complete studies of all matters pertaining to the taxation of interstate commerce . . . ." Pub.L. No. 86-272 (Sept. 14, 1959), 73 Stat. 555, as amended by Pub.L. No. 87-17 (Apr. 7, 1961), 75 Stat. 41; Pub.L. No.87-435 (Apr. 21, 1962), 76 Stat. 55.

The designated Congressional committees, striving to fulfill their mandate, have completed studies, reported findings

and conclusions,[18] held hearings,[19] and proposed legislation.[20] Although the chronicles of the Committees' efforts are steadfastly optimistic that a comprehensive legislative solution can be effected,[21] the task is not yet completed.

Thus the mosaic of law created by this Court over the period of a hundred years has been easy to criticize, but is proving difficult to improve. Even Mr. Justice Clark observed in *Northwest States Portland Cement Co., supra*, "From the quagmire there emerged . . . some firm peaks of decision which remain unquestioned." 358 U.S. at 458. Those peaks of decision should not, we suggest, be radically altered except by Congressional action.

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18. *See, e.g.*, H. R. Rep. No. 1480, 89th Cong., 1st Sess. (1965); H. R. Rep. No. 565, 89th Cong., 1st Sess. (1965); H. R. Rep. No. 952, 89th Cong., 1st Sess. (1965).

19. *See, e.g.*, Hearings Before the Special Subcomm. on State Taxation of Interstate Commerce of the House Comm. on the Judiciary, 87th Cong., 1st Sess., Ser. 20 (1961); Hearings Before the Special Subcomm. on State Taxation of Interstate Commerce of the House Comm. on the Judiciary, 87th Cong., 2d Sess., Ser. 20a(1962); Hearings Before the Subcomm. on State Taxation of Interstate Commerce of the Senate Comm. on Finance, 93d Cong., 1st Sess. (1973); Hearings on H. R. 2096 Before the Subcomm. on State Taxation of Interstate Commerce of the Senate Comm. on Finance, 93d Cong., 2d Sess. (1974).

20. *See, e.g.*, H. R. 11798, 89th Cong., 1st Sess. (1965); H. R. 16491, 89th Cong., 2d Sess. (1966); H. R. 2158, 90th Cong., 1st Sess. (1967); H. R. 2179, 91st Cong., 1st Sess. (1969); H. R. 7906, 91st Cong., 1st Sess. (1969); S. 916, 91st Cong., 1st Sess. (1969); S. 317, 92d Cong., 1st Sess. (1971); S. 1210, 92d Cong., 1st Sess. (1971); H. R. 1538, 92d Cong., 2d Sess. (1972); S. 3333, 92d Cong., 2d Sess. (1972); S. 4080, 92d Cong., 2d Sess. (1972); H. R. 977, 93d Cong., 1st Sess. (1973); S. 1245, 93d Cong., 1st Sess. (1973); S. 2092, 93d Cong., 1st Sess. (1973); S. 282, 93d Cong., 1st Sess. (1973).

21. *See, e.g.*, the remarks of then Senator Mondale, Chairman, in Hearings Before the Subcomm. on State Taxation of Interstate Commerce of the Senate Comm. on Finance, 93d Cong., 1st Sess. 1-2 (1973).

IV. The Policy Reasons Underlying a Need For Continued Protection of Movement in Interstate and Foreign Commerce Apply to Stevedoring.

Petitioner has used the following language to express what it asks of this Court:

> "The State asks nothing less of this Court than to overrule its prior decisions in the Stevedoring cases on the grounds that the principles upon which the stevedoring cases are based are not reconcilable with the principles established in the recent cases of *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), and *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)." (Pet. Br. pp. 11-12)

Despite the words "nothing less," the quoted language actually understates what Petitioner asks this Court to do. Petitioner, in fact, claims the power, under both the Import-Export Clause and the Commerce Clause to impose a tax on *any* "act or privilege of engaging in the business of transporting goods moving in interstate or foreign commerce . . . ." (Pet. Br. pp. 13, 32). In other words, while Petitioner purports to ask only for the power to tax stevedores, the *principles* that it asks this Court to adopt include the power to tax *any carrier* of interstate or foreign commerce. In response, we have heretofore explained why we believe existing protection for interstate and foreign *movement* in commerce should be continued.

However, because only stevedoring activities are involved in the facts of this case, we conclude this brief by focusing on the loading and unloading part of the entire interstate and foreign carriage.

By its decisions in *Michelin Tire Corp. v. Wages, supra* (overruling *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1972)), and in *Complete Auto Transit, Inc., supra* (overruling *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951)), this Court has recently demonstrated that it will not shrink from overruling even the most hoary precedent. Nevertheless we trust that this Court retains its respect for the policies underlying the principle of *stare decisis*. Quite aside from *stare decisis*, we suggest two strong reasons for retaining stevedoring in the protection of movement in foreign and interstate commerce.

The first of these is based upon what we have termed the "tollgate syndrome." That syndrome was feared by the Constitutional draftsmen who imposed the express prohibitions of the Import-Export Clause, and by this Court as it constructed, over a century, an analogous protection for movement in interstate commerce pursuant to the implications of the Commerce Clause. The "pragmatic" approach, urged on this Court by Petitioner and embraced by Respondents, suggests a like protection for stevedoring. We believe we have already demonstrated (in part II C, *supra*) that stevedoring is an ideal vehicle for a tollgate abuse. The language of the cases that protected movement over a century prior to *Western Live Stock* may have an archaic ring to modern legal scholars, but there was a pragmatic wisdom underlying those decisions as applied to the facts of those cases—movement in foreign and interstate commerce. If a pragmatic view is to be taken of the existing and potential abuse of an excise imposed by a seaport jurisdiction, the fact that stevedoring is performed "wholly within the territorial limits of the State of Washington" (Pet. Br. p. 4), and (by reason of separate

invoicing) is "self-apportioning" (Pet. Br. p. 22), is not a consideration entitled to weight. See discussion at Part II C, *supra*.

We close this argument directed to the pragmatic view of the tollgate syndrome with an observation about this Court's decision in the second stevedoring case, *Carter & Weekes, supra*. That decision was made 10 years after the so-called "modern" doctrine enunciated in *Western Live Stock, supra*. There was ample time for reflection. A careful reading of that decision will show that this Court was aware of virtually every argument presented to it by Petitioner—and the arguments were couched in modern terms. For example, the issue of multiple imposition was directly addressed in that case. This Court reasoned that if the carriage by the interstate carrier could be taxed at one end, it could be taxed at the other end and in the middle. 330 U.S. at 427-30. Clearly, that reasoning is correct if a pragmatic view is taken of the tollgate syndrome. That view requires, as in the first stevedore case (*Puget Sound, supra*), *that the interstate carriage must be regarded as including the loading and unloading as well as the journey itself.*[22] If apportionment will not save a tax on the *middle segments* of the journey it should not save a tax on the *end segments*. That should be true whether the apportionment be by formula or "self-apportionment."

A second reason for retaining stevedoring in the continued protection of foreign and interstate carriage is consistency with related fields of law. In treating loading and

22. If this Court were to decide otherwise, the resulting rule would also be inconsistent with the physical reality that the goods have not become part of the mass of property within the state—and the foreign or interstate commerce is not complete—until the goods have been unloaded from the vessel.

unloading as the responsibility of the foreign and interstate carrier, this Court has decided consistently with maritime common law,[23] federal statutes,[24] and international agreements[25] governing the carriage of goods by sea.

Moving that boundary line to separate loading and discharge of goods from the carriage of those goods would contravene the long-established principle that such carriage begins and ends with the goods at a place of rest on the dock:

> "'[I]t is as much the duty of the shipowner to load and discharge the cargo as it is to carry it between the loading and discharging ports.'" *Union Marine & General Ins. Co. v. American Export Lines, Inc.*, 274 F. Supp. 123, 128 (S.D.N.Y. 1966), quoting *Munson S.S. Line v. Glasgow Nav. Co.*, 235 F. 64 (2d Cir. 1916), *cert. denied*, 243 U.S. 643 (1917), *appeal dismissed*, 246 U.S. 647 (1918).[26]

23. *See Ex Parte Easton*, 95 U.S. 68, 75-76 (1877); *The Eddy*, 72 U.S. (5 Wall.) 481, 495 (1867); *Calcot, Ltd. v. Isbrandtson Co.*, 318 F.2d 669, 673 (1st Cir. 1963); *American President Lines, Ltd. v. Federal Maritime Board*, 317 F.2d 887, 888 (D.C. Cir. 1962).

24. The Carriage of Goods by Sea Act, 46 U.S.C. § 1303, governing foreign commerce, defining carrier responsibility (and liability) provides in pertinent part:

> "(2) The Carrier shall properly and faithfully load, handle, stow, carry, keep, care for, and discharge the goods carried."

The Harter Act, 46 U.S.C. § 190, governing interstate and foreign maritime commerce, likewise provides:

> "It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in property loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge."

25. Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea, *Concluded* August 25, 1924, 51 Stat. 233, T.S. No. 931, article 3, §§ 2 and 8. The pertinent sections of this international agreement are substantially the same as 46 U.S.C. §§ 1303(2) & 190, quoted in note 24, *supra*. See Appendix A to this brief.

By way of elaboration,

> "'The personal services of watchmen or stevedores . . . are necessary to enable the ship to discharge her maritime duty . . . ; *they are rendered in the course of the voyage . . .*'" *Union Marine*, *supra* at 128, quoting *The Seguranca*, 58 F. 908, 909 (S.D.N.Y. 1893) (emphasis supplied).

Thus, the loading and discharge of cargo are no less the carrier's obligation merely because they are physically accomplished by stevedores rather than members of the ship's crew:

> "The work of loading and unloading is historically 'the work of the ship's service.' [Citation omitted.]
>
> ". . . The shipowner is not relieved of these responsibilities by turning control of the loading or unloading of the ship over to a stevedoring company . . . ." *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, 427-28 (1959).[27]

26. *See also Ex Parte Easton*, 95 U.S. 68, 75-76 (1877); *The Eddy*, 72 U.S. (5 Wall.) 481, 495 (1867); *Calcot, Ltd. v. Isbrandtson Co.*, 318 F.2d 669, 673 (1st Cir. 1963); *Isthmian S.S. Co. v. California Spray-Chemical Corp.*, 300 F.2d 41 (9th Cir. 1962); *Baltimore & O.R. Co. v. United States*, 201 F.2d 795, 796-97 & n.3 (3d Cir. 1953); *The Titania*, 131 F. 229, 230 (2d Cir. 1904); *Toyamenka, Inc. v. S.S. Tosoharu Maru*, 392 F. Supp. 450 (S.D.N.Y. 1974); *cf. Lagomarsino v. Pacific Alaska Navigation Co.*, 100 Wash. 105, 112, 170 P. 368 (1918).

The scope of carriage by sea cannot be limited to exclude the loading and discharge of goods regardless of contrary contractual terms. 46 U.S.C. §§ 1303 (8), 190; *Levatino v. American President Lines, Ltd.*, 233 F. Supp. 697, 701 (S.D.N.Y. 1964); *Brown & Williamson Tobacco Corp. v. The S.S. Anghyra*, 157 F. Supp. 737, 749 (E.D. Va. 1957), *modified on other grounds sub. nom. Hellenic Lines, Ltd. v. Brown & Williamson Tobacco Corp.*, 277 F.2d 9 (4th Cir.), *cert. denied*, 364 U.S. 879 (1960).

27. *Accord, Ferrante v. Swedish Am. Lines*, 331 F.2d 571 (3d Cir.), *cert. denied*, 379 U.S. 801 (1964); *Inland Waterways Shippers Ass'n v. Mississippi Valley Barge Line Co.*, 194 F. Supp. 818, 822 (E.D. Mo. 1960), *appeal dismissed*, 289 F.2d 374 (8th Cir.), *cert. denied*, 368 U.S.

To summarize, the movement of goods by sea in interstate and foreign commerce: (a) begins with the goods at a point of rest on the dock of departure; (b) includes the loading and stowage of the goods on board the vessel, the vessel's transit from port of departure to port of destination, and the unloading or discharge of the goods from the vessel; and (c) ends when the goods have reached a point of rest on the dock at destination. Curtailment of this long-settled scope of the carriage by sea would fly in the face of the United States' international agreements, its statutes, and centuries of common law.

Thus, we see that the existing line of protection established by this Court's decisions have solid rationales behind them. We suggest that there is no equally satisfactory rationale for drawing another line.

---

876 (1961); *cf. Levatino Co. v. M/S Helving Torm*, 295 F. Supp. 725 (S.D.N.Y. 1968).

Moreover, the loading and discharge of goods is no less the carrier's obligation where the shipper, not the carrier, obtains or pays for the services of the stevedoring company:

> "Regardless of what individual or company does the actual manual loading of a barge, a water carrier cannot avoid its common law and statutory duty to properly load, stow and discharge the cargo. Therefore, it makes no difference whom the stevedores were representing, *the duty to properly load* and use reasonable care in the transportation of *the cargoes in question rested upon the defendant* [carrier]." *Inland Waterways, supra*, at 822 (emphasis supplied).

Accord, *International Drilling Co. v. M/V Doriefs*, 219 F. Supp. 479, 488 (S.D. Tex. 1968); *Mondella v. S.S. Elie V*, 223 F. Supp. 390, 392 (S.D.N.Y. 1963).

CONCLUSION

We have emphasized the express prohibition of the Import-Export Clause (Petitioner aptly terms it a "flat" prohibition). This Court has shown that Clause the respect that express language in the Constitution deserves. It has consistently refused to abridge the plain language of the Import-Export prohibition — including, for example, in cases where abridgment is sought because a tax is asserted to be nondiscriminatory.

It is stipulated in the instant case (by incorporation of the *Puget Sound Stevedoring Co.* facts) that imports and exports are involved here. Quite aside from this Court's prior decisions that excises on the carrier are within the scope of the Clause, the physical reality of the instant facts—that the process of loading and unloading is involved—make clear that the subject imports and exports are in the "process" of importing and exporting.

We have also addressed the purpose of the Import-Export Clause, as this Court has explained that purpose from the earliest days of its history through recent times. In addressing the purpose of the Clause, we have described a concern of the Constitutional draftsmen with what we have termed the "tollgate syndrome". Our argument on that point under the Import-Export Clause logically has become intertwined with our argument under the Commerce Clause. We have suggested that this Court has also evidenced a concern with the tollgate syndrome in its decisions involving *movement* in commerce. It is that concern, and not the rhetoric of the older versus the more recent cases, that has distinguished the *movement* cases

under the Commerce Clause from the *transactional* cases (involving sales, advertising and commissions on sales).

The tollgate syndrome operates under circumstances where a jurisdiction controlling a commerce gateway, such as a seaport, can broaden its tax base at the expense of nonresidents. Stevedoring clearly provides an ideal means of exacting a toll. The fact that it occurs "wholly within the territorial limits of the State of Washington" is without relevance when a pragmatic view is taken of the tollgate syndrome. As this Court recognized in the celebrated case of *Brown v. Maryland*, a toll on imports and exports can be as easily levied when the goods are landed as when they enter the harbor. In its economic effect, the tax imposed by Petitioner is such a toll and, therefore, violative of the Import-Export and Commerce Clauses of the United States Constitution.

Respondents respectfully request the Court to affirm the decision of the Washington Supreme Court, holding unconstitutional Petitioner's attempt to impose its business and occupation tax on the stevedores' loading and unloading of goods in foreign and interstate commerce.

Respectfully submitted,

JOHN T. PIPER
MAX KAMINOFF
D. MICHAEL YOUNG
Counsel for Respondents

APPENDIX A

INTERNATIONAL AGREEMENT:

Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea, *concluded* August 25, 1924, 51 Stat. 233, T.S. 931, art. 3, §§ 2 & 8:

2. Subject to the provisions of Article 4 the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

. . . . .

8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault, or failure in the duties and obligations provided in this article, or lessening such liability otherwise than as provided in this convention, shall be null and void and of no effect. A benefit of insurance in favor of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

STATUTES: Washington Revised Code:

82.04.260 Tax on buyer and wholesaler of grains and dry peas—Flour manufacturers—Seafood products manufacturers—Fruit and vegetable processors—Aluminum manufacturers—Research and development organizations—Perishable meat products processors and wholesalers—Nuclear fuel assemblies—Travel agents. (1) Upon every person engaging within this state in the business of buying wheat, oats, dry peas, corn, rye and barley, but not including any manufactured or processed products thereof, and selling the same at wholesale; the tax imposed shall be equal to the gross proceeds derived from such multiplied by the rate of one one-hundredth of one percent.

(2) Upon every person engaging within this state in the business of manufacturing wheat into flour; as to such persons the amount of tax with respect to such business shall be equal to the value of the flour manufactured, multipled by the rate of one-eighth of one percent.

(3) Upon every person engaging within this state in the business of splitting or processing dried peas; as to such persons the amount of tax with respect to such business shall be equal to the value of the peas split or processed, multiplied by the rate of one-quarter of one percent.

(4) Upon every person engaging within this state in the business of manufacturing seafood products which remain in a raw, raw frozen, or raw salted state at the completion of the manufacturing by that person; as to such persons the amount of tax with respect to such business shall be equal to the value of the products manufactured, multiplied by the rate of one-eighth of one percent.

(5) Upon every person engaging within this state in the business of manufacturing by canning, preserving, freezing or dehydrating fresh fruits and vegetables; as to such persons the amount of tax with respect to such business shall be equal to the value of the products canned, preserved, frozen or dehydrated multiplied by the rate of three-tenths of one percent.

(6) Upon every person engaging within this state in the business of manufacturing aluminum pig, ingot, billet, plate, sheet (flat or coiled), rod, bar, wire, cable or extrusions; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products manufactured multiplied by the rate of four-tenths of one percent.

(7) Upon every nonprofit corporation and nonprofit association engaging within this state in research and development, as to such corporations and associations, the amount of tax with respect to such activities shall be equal to the gross income derived from such activities multiplied by the rate of forty-four one-hundredths of one percent.

(8) Upon every person engaging within this state in the business of slaughtering, breaking and/or processing perishable meat products and/or selling the same at wholesale; as to such persons the tax imposed shall be equal to the gross proceeds derived from such sales multiplied by the rate of thirty-three one hundredths of one percent.

(9) Upon every person engaging within this state in the business of making sales, at retail or wholesale, of nuclear

fuel assemblies manufactured by that person, as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the assemblies multiplied by the rate of twenty-five one-hundredths of one percent.

(10) Upon every person engaging within this state in the business of manufacturing nuclear fuel assemblies, as to such persons the amount of tax with respect to such business shall be equal to the value of the products manufactured multiplied by the rate of twenty-five one hundredths of one percent.

(11) Upon every person engaging within this state in the business of acting as a travel agent; as to such persons the amount of the tax with respect to such activities shall be equal to the gross income derived from such activities multiplied by the rate of twenty-five one-hundredths of one percent.

82.04.330 Exemptions—Agriculture. This chapter shall not apply to any person in respect to the business of growing or producing for sale upon his own lands or upon land in which he has a present right of possession, any agricultural or horticultural produce or crop, including the raising for sale of any animal, bird, or insect, or the milk, eggs, wool, fur, meat, honey, or other substance obtained therefrom, or in respect to the sale of such products at wholesale by such grower, producer, or raiser thereof. This exemption shall not apply to any person selling such products at retail or using such products as ingredients in a manufacturing process; nor to the sale of any animal or substance obtained therefrom by a person in connection with his business of operating a stockyard or a slaughter or packing house; nor to any person in respect to the business of taking, cultivating, or raising Christmas trees or timber; nor to any association of persons whatever, whether mutual, cooperative or otherwise, engaging in any business activity with respect to which tax liability is imposed under the provisions of this chapter.

82.04.430 Deductions enumerated. In computing tax there may be deducted from the measure of tax the following items:

(11) By those engaged in banking, loan, security or other financial businesses, amounts derived from interest received on investments or loans primarily secured by first mortgages or trust deeds on nontransient residential properties; . . .

82.04.500 Tax part of operating overhead. It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers, but that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons.

82.16.020 Public utility tax imposed. There is levied and there shall be collected from every person a tax for the act or privilege of engaging within this state in any one or more of the businesses herein mentioned. The tax shall be equal to the gross income of the business, multiplied by the rate set out after the business, as follows:

(1) Railroad, express, railroad car, water distribution, light and power, telephone and telegraph businesses: Three and six-tenths percent;

(2) Gas distribution business: Three percent;

(3) Urban transportation business: Six-tenths of one percent;

(4) Vessels under sixty-five feet in length, except tugboats, operating upon the waters within the state: Six-tenths of one percent;

(5) Motor transportation and tugboat businesses, and all public service businesses other than ones mentioned above: One and eight-tenths of one percent.

APPENDIX B

The importance of agriculture in Washington relative to other industries is indicated by the data below, considered in conjunction with the data on the following page, showing that agriculture (combining wheat, fruits and vegetables) ranks third among the state's exports even though less than one-fourth of the nearly two billion dollars of agricultural production is exported.

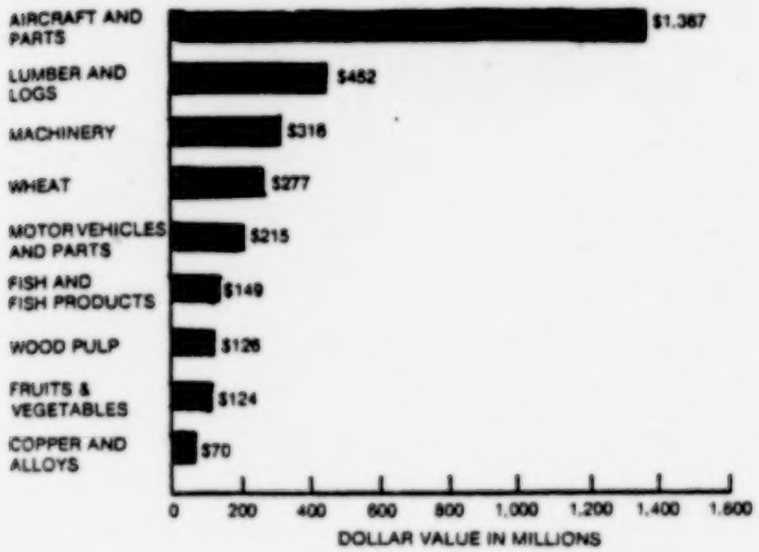
TONNAGE AND VALUE, CROPS, LIVESTOCK AND LIVESTOCK PRODUCTS WASHINGTON, 1975-76

Value		
1975	1976 Preliminary	Percent of Previous Year
— 000 Dollars —		Percent
1,077,227	941,120	87.4
26,045	30,533	117.2
208,846	258,726	123.9
12,747	14,495	113.7
93,933	89,938	95.7
1,418,798	1,334,812	94.1
120,356	122,000	101.4
454,375	521,982	114.9
1,993,529	1,978,794	99.3

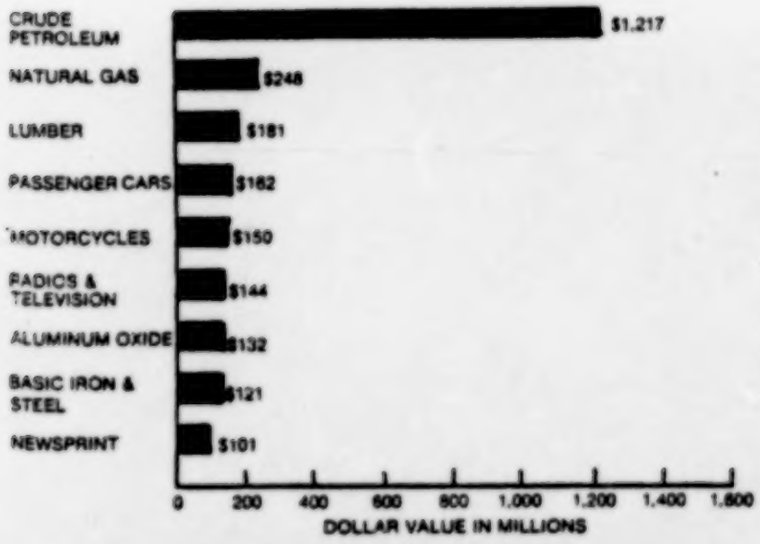
Source: Washington Crop & Livestock Reporting Service, Washington Department of Agriculture, and United States Department of Agriculture Statistical Reporting Service; Washington Agricultural Statistics 1976, at 5 (1976).

FOREIGN TRADE — LEADING COMMODITIES
Leaving and Entering Washington Ports
1975

Exports



Imports



NOTE: "WASHINGTON PORTS" MEANS THE SEATTLE CUSTOMS DISTRICT. IT INCLUDES ALL WASHINGTON PORTS EXCEPT VANCOUVER, LONGVIEW AND KALAMA, WHICH ARE PARTS OF THE PORTLAND, OREGON CUSTOMS DISTRICT.

SOURCE: DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT. (C-06)

State of Washington, Office of Program Planning & Fiscal Management, Pocket Data Book 1976, at 23 (December, 1976).

Supreme Court, U. S.
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FOR ARGUMENT

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1976

No. 76-1706

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v.

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES, *et al.*, *Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITIONER'S REPLY BRIEF

SLADE GORTON
Attorney General
State of Washington

RICHARD H. HOLMQUIST
Senior Assistant Attorney General

MATTHEW J. COYLE
Assistant Attorney General
Attorneys for Petitioner

Office and Post Office Address: Temple of Justice
Olympia, Washington 98504. Telephone: (206) 753-5528

STATE PRINTING PLANT OLYMPIA, WASHINGTON

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MATTHEW J. COYLE
Assistant Attorney General
Attorneys for Petitioner

Office and Post Office Address: Temple of Justice
Olympia, Washington 98504. Telephone: (206) 753-5528

STATE PRINTING PLANT ◆ OLYMPIA, WASHINGTON

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PETITIONER'S REPLY BRIEF

INTRODUCTION

In their brief, the respondent Stevedores really advance only three major arguments in support of the decision below: (1) the language of the Import-Export Clause[1] constitutes a flat prohibition against state excise taxes on imports or exports (Resp. Br. 9-18); (2) Washington's business and occupation (B&O) tax on stevedoring activity amounts to a toll or transit fee on goods moving through Wash-

[1] U.S. Const., Art. I, §10, cl. 2.

ington ports, thus creating an evil which the Import-Export Clause was designed to prevent (Resp. Br. 19-23); and (3) even fairly apportioned, non-discriminatory state excise taxes on interstate carriers should be struck down on Commerce Clause[2] grounds because such taxes are capable of being used to exact tolls from commerce moving through a state (Resp. Br. 23-33).

The short answer to the Stevedores' first argument is that neither the plain language nor the purposes of the Import-Export Clause require a *per se* ban on all types of state "excise" taxes imposed on carriers or handlers of goods moving in the import-export process. By its express terms, the Import-Export Clause prohibits only "Imposts and Duties", *i.e.* taxes directed at imports or exports as such. An excise tax such as Washington's fairly apportioned, non-discriminatory state B&O tax on stevedoring activity is not directed at imports or exports as such and is therefore not an "impost" or "duty" within the meaning of those terms as used in the Import-Export Clause.

It is apparent that the second and third arguments are one and the same: if a state tax creates a "trade barrier" impeding the free flow of goods in interstate or foreign commerce, such a tax contravenes the purposes of *both* the Commerce and Import-Export Clauses. The short answer to this argument is that a fairly apportioned non-discriminatory tax

[2] U.S. Const., Art. I, §8, cl. 3.

on handlers or carriers of goods moving in interstate or foreign commerce cannot create the "trade barrier" effect forbidden by the Constitution. Rather, such a tax constitutes a permissible demand on interstate or foreign commerce in return for the governmental services rendered to such commerce by the taxing state. To accept the Stevedore's argument would be to return to the discarded notion that the Commerce and Import-Export Clauses create a "free trade" zone of immunity and would require the states to subsidize the conduct of interstate and foreign commerce within their borders.

ARGUMENT

I. The Language of the Import-Export Clause Does Not Require a Per Se Ban On All Types of State Excise Taxes Imposed On Carriers or Handlers of Goods Moving in the Import-Export Process.

The Stevedores argue that the language of the Import-Export Clause constitutes a flat prohibition against all types of state "excise" taxes on imports or exports, citing *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946). Resp. Br. 9-18. However, neither the plain language of the Import-Export Clause nor *Richfield Oil* supports the Stevedores' expansive view of the protection afforded imports and exports by the Constitution.

First, the plain language of the Import-Export Clause contains a flat prohibition *only* against "Imposts and Duties" levied by a state. The term "excise"

does not appear anywhere in the Clause. To demonstrate that there is a difference between "Imposts and Duties" and "excises", well understood by the Framers of the Constitution, one need only cite U. S. Const., Art. I, §8, cl. 1, which provides:

> "The Congress shall have Power to lay and collect Taxes, Duties, Imposts *and Excises*, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts *and Excises* shall be uniform throughout the United States; * * *" (Emphasis supplied)

Thus, even the Framers recognized a distinction between "Imposts and Duties" and "Excises". That distinction was explained in a 1911 case in which the Court held that a corporate net income tax levied by the United States was an "excise":

> "Duties and imposts are terms commonly applied to levies made by governments on the importation or exportation of commodities. Excises are 'taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges.' Cooley, Const. Lim. 7th Ed. 680." *Flint v. Stone Tracy Co.*, 220 U.S. 107, 151 (1911).

Washington's B&O tax on the Stevedores is undeniably an "excise tax". But that characterization alone does not bring the tax within the term "Imposts and Duties" as used in the Import-Export Clause. In order to be regarded as an impost or

duty, a tax, by whatever name it may be called, must be directed at imports or exports as such or must create an evil the Import-Export Clause was specifically designed to prevent. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 293-294 (1976).[3]

Second, to the extent that *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946), can be said to stand for the proposition that the Import-Export Clause prohibits *any tax*, whether or not discriminatory, on imports or exports, it has been impliedly limited by this Court's decision in *Michelin*, *supra*. In *Richfield Oil*, the Court held that California's sales tax, as applied to the sale of oil to the government of New Zealand consummated by delivery on board a New Zealand Navy tanker berthed in Los Angeles violated the Import-Export Clause because at the time the tax attached the oil had the status of an "export", i.e., it was in the export process. Thus, the *Richfield Oil* decision is merely one of a long line of cases representing an earlier approach taken by this Court in attempting to identify the time at which an absolute immunity from all forms of state taxation attached to goods because of the *status* of such goods as imports or exports. See, e.g., *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534 (1959), and other cases

[3] Of course, the above discussion is not to suggest that an "excise" tax can never be considered an "impost or duty" within the plain meaning of the Import-Export Clause. Rather, it underscores the point made in *Michelin*, *supra*, and *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), that the proper inquiry is into the practical operation and effect of the tax rather than a mere formalistic search for the correct "label"—an approach with which the Stevedores understandably have little sympathy.

cited and discussed in Petitioner's Opening Brief at pp. 35-36.

To be sure, during the course of the *Richfield Oil* opinion, Justice Douglas, speaking for the majority, declined to read into the Import-Export Clause an implied qualification limiting the scope of the Clause's prohibition solely to discriminatory state taxes. *Richfield Oil, supra*, 329 U.S. at 75-78, quoted in Resp. Br. at 11-12. But that view surely has been modified by this Court's decision in *Michelin, supra*, upholding a general, non-discriminatory ad valorem property tax on imported tires without regard to whether the goods had lost their status as imports. As one commentator has explained:

> "In *Michelin*, the Court disentangled itself from the thorny problem of locating imported goods in time and space in the context of their intended use to determine whether they had retained their distinctive character as imports. Instead, the Court's opinion makes it clear that the central question in such cases is whether the exaction at issue discriminates against imported goods on the basis of their foreign origin."

W. Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?* 75 MICH. L. REV. 1426, 1447 (1977).

In sum, neither the plain language of the Import-Export Clause nor the Court's decisions construed in *Richfield Oil* provides any basis for the rigid per se ban on all types of state excise taxes imposed

on carriers or handlers of goods moving in the import-export process urged upon this Court by the Stevedores. The remaining and crucial inquiry is whether the tax in question—whatever its "label"—discriminates against imports and exports or otherwise causes evils which the Import-Export Clause was designed to prevent, and it is to this subject (and its companion, discrimination under the Commerce Clause) we now turn.

II. The Challenged Tax on Stevedoring Activity Does Not Discriminate Against Interstate or Foreign Commerce, and Does Not Produce Effects Forbidden by the Commerce or Import-Export Clause.

The Stevedores argue that Washington's B&O tax on stevedoring activity amounts to a toll or "transit fee" on goods moving in interstate or foreign commerce, and is therefore invalid under both the Commerce and Import-Export Clauses. Resp. Br. 19-33. Beginning with the premise that the B&O tax on stevedoring activity "* * * has the economic affect [sic] of 'singling out' water-carried imports and exports * * *" (Resp. Br. 21), the Stevedores argue that even a fairly apportioned, nondiscriminatory excise tax levied on handlers of goods moving in interstate or foreign commerce should be struck down because such taxes cast burdens on noncitizens of the taxing state and create the risk of what the Stevedores term a "tollgate syndrome", thus causing the "trade barrier" effect which the

Commerce and Import-Export Clauses were designed to prevent.

This argument is without merit. Washington's B&O tax does not "single out" Stevedoring activities; the tax does not cast impermissible burdens on non-citizens of the state, or put otherwise, the tax does not amount to a toll or "transit fee" on goods moving through Washington ports.

A. *Washington's B&O Tax Does Not "Single Out" Stevedoring Activity.*

Washington's B&O tax is a broad-based gross receipts tax reaching virtually every business and occupation carried on in the state. See, RCW 82.04-.220 (Pet. Br. App. A). Washington has no net income tax, and therefore must depend upon the B&O tax as a major source of revenue for the support of state government.[4]

Although, as pointed out by the Stevedores, there are differing tax rates applicable to different types of business activity (Resp. Br. 3-4),[5] the tax rate which would be applied to the Stevedores (1.06 percent) is the same as that applied generally to all

[4] In the 1977-79 biennium, the B&O tax is estimated to be the source of 10.9 percent of the state's general fund revenue. The retail sales and use tax (RCW chapters 82.08 and 82.12, respectively) is the only larger single source of tax revenue for the state. See 1977-79 Budget Message of Governor Dixy Lee Ray, p. 3 (App. A, hereto).

[5] Presumably, a major reason for these differing tax rates is the legislature's judgment about the relative profitability of different classes of business. Given that B&O tax liability is determined without regard to whether a particular taxpayer has turned a profit, structuring tax rates according to relative profitability more closely approaches taxation on an "ability to pay" basis while at the same time providing a firm foundation for tax revenues in periods of statewide economic downturns.

businesses of a service nature, e.g., barbers, accountants, doctors, freight consolidators, etc.

In passing, the Stevedores' apparent argument that the multiplicity of B&O tax rates makes it susceptible to discriminatory use against stevedoring activity (Resp. Br. 31-33) can have no relevance to the present case. First, as this Court observed in *Complete Auto Transit*, *supra*, the mere risk of such discrimination is not sufficient to require a per se rule of unconstitutionality; 430 U.S. 274 at 288-289, fn. 15. Second, this argument really goes only to the *measure* of the tax, and not to its *subject*, yet this present case concerns the Stevedores' claim that it is the character of the subject of the tax (that is, stevedoring activity) which somehow renders it unconstitutional.

Given the broad-based application of the B&O tax and its non-discriminatory imposition on the Stevedores, it is sheer nonsense to argue that the tax "singles out" water-carried imports and exports. The Stevedores are not being asked to bear a special tax burden not borne by other businesses similarly situated, nor are they being asked to pay a tax on business activity conducted in other states. Thus, even if it could be said that a tax on the carrier is equivalent to a tax on the goods (Resp. Br. 22), there is nothing in the application of Washington's B&O tax to stevedoring activity which "singles out" imports and exports for special tax treatment. All that Washington has done is to require the Stevedores to

bear their fair share of the cost of governmental services rendered to them by the State. See, *Michelin*, *supra*, 423 U.S. 276 at 287; *Complete Auto Transit*, *supra*, 430 U.S. 274 at 288.

B. *Washington's B&O Tax on Stevedoring Activities Does Not Cast Impermissible Tax Burdens on Non-Citizens of the State.*

In the course of their arguments regarding both the Commerce and Import-Export Clauses, the Stevedores make much of what they perceive to be a distinction in this Court's decisions involving "movement" and "non-movement" cases. Resp. Br. 18, 23-28. According to the Stevedores, this Court's decisions in *Interstate Oil Pipeline Co. v. Stone*, 337 U.S. 662 (1949), *Canton Railroad Co. v. Rogan*, 340 U.S. 511 (1951), and *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), can be distinguished from the present case because, say the Stevedores, they all involved an excise tax on intrastate carriers who linked up with interstate carriers. Because, in the Stevedores' view, local consumers and producers bear the tax burden in such local transit, these decisions do not operate to cause the "tollgate syndrome" claimed to result from Washington's tax. Resp. Br. 26-27. Not only is this argument logically inconsistent, but it also misses the point.

If one accepts the Stevedores' premise that a tax on the mover of goods is equivalent to a tax on the goods themselves, then surely the Stevedores would have to contend that a tax on the *intrastate*

portion of carriage of goods moving in *interstate* commerce operates to create the very sort of impermissible "toll" on the entry or departure of such goods into or from the taxing state as they complain of in the present case, and presumably, such a tax should be struck down. Yet, in both *Interstate Oil Pipeline*, *supra*, and *Complete Auto Transit*, *supra*, the Court upheld the challenged Mississippi taxes even though it expressly assumed that the local in-state movement of goods was a part of interstate commerce. *Interstate Oil Pipeline*, 337 U.S. at 666; *Complete Auto Transit*, 430 U.S. at 276, fn. 4.

Furthermore, the third of these cases, *Canton Railroad*, *supra*, cannot be so easily dismissed as the Stevedores have attempted, given that it involved a gross receipts tax on an intrastate railroad carrying goods moving in interstate and foreign commerce to and from inland states. Local consumers and producers were not asked to bear the economic burden of the tax, but the tax was nevertheless sustained against a challenge under the Import-Export Clause.

More generally, the Stevedores are really arguing for a return to the discarded notion that interstate and foreign commerce should enjoy a "free trade" immunity from state taxation. See, e.g., *Freeman v. Hewit*, 329 U.S. 249, 252 (1946); *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951).

The point to be made—which the Stevedores

miss—is that if the states can require interstate or foreign commerce to "pay its way", the economic burden of one state's tax must necessarily be borne to some extent by citizens of other states. Contrary to the argument of the Stevedores, the mere fact that a state's tax causes the cost of transporting goods to be somewhat higher than might otherwise be the case does not in and of itself create the "trade barrier" effect forbidden by the Constitution. There is no good reason why consumers and producers in other states or foreign countries should not bear some of the costs incurred by Washington in rendering governmental services to transporters of goods entering into or departing from Washington any more than such persons should not be required to bear other costs incurred by the transporter of goods. While it is possible, if not even likely, that allowance of Washington's tax may increase somewhat the cost of goods purchased either by "inland" or foreign customers, surely, as in *Michelin*, "* * * such taxation is the *quid pro quo* for benefits actually conferred by the taxing State." *Michelin*, *supra*, 423 U.S. 276, at 289.

The crucial question, which the Stevedores alternately ignore and dismiss, is whether the tax in question in practical operation and effect discriminates against or imposes multiple burdens upon goods moving through Washington. If it does not, the tax—however it be termed—does not create the evils forbidden by the Commerce and Import-Export

Clauses, and should be regarded as exacting a constitutionally permissible demand on interstate and foreign commerce in return for the governmental services rendered by Washington.

One final argument must be stated. As already discussed, the Stevedores in their brief have attempted to draw as an important distinction a line between decisions of this Court involving movement and those involving non-movement; Resp. Br. 23, et seq. Several shortcomings of this analysis have already been discussed throughout this brief but one additional consideration deserves attention.

In a real sense, both *Michelin* and *Complete Auto Transit* constitute victories of substance over mere formalism, and of economic reality over purely mechanistic labeling.[6] Having demonstrated that Washington's B&O tax on stevedoring activities does not contravene any of the purposes of the Commerce or Import-Export Clauses, Washington submits that no useful or functional object would be served were this Court to resolve this case by adopting still another rigid formalism to determine the validity of the challenged tax, namely that offered by the Stevedores of attempting to distinguish between movement and non-movement. Were such a distinction to be raised to the exalted station of a constitutional standard for the Commerce and Import-Export Clauses, the law concerning the powers of states to

[6] See generally, W. Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?* 75 MICH. L. REV. 1426 (1977).

tax would be set back to a rule of "draftsmanship and phraseology", a rule which this Court so clearly has rejected in its two recent Commerce and Import-Export Clause cases.

CONCLUSION

For all the reasons set forth in this brief and Petitioner's Opening Brief, Washington's business and occupation tax upon stevedoring activities does not abridge any of the purposes of either the Commerce or Import-Export Clauses of the Constitution; nor does it produce any constitutionally proscribed effects on interstate or foreign commerce.

In order to complete the orderly revision of this Court's interpretations of the Commerce and Import-Export Clauses reflected in *Complete Auto Transit* and *Michelin, supra*, the decision of the court below should be reversed and the constitutional validity of the challenged administrative rule should be upheld.

DATED this 10th day of January, 1978.

Respectfully submitted,

SLADE GORTON
Attorney General
State of Washington

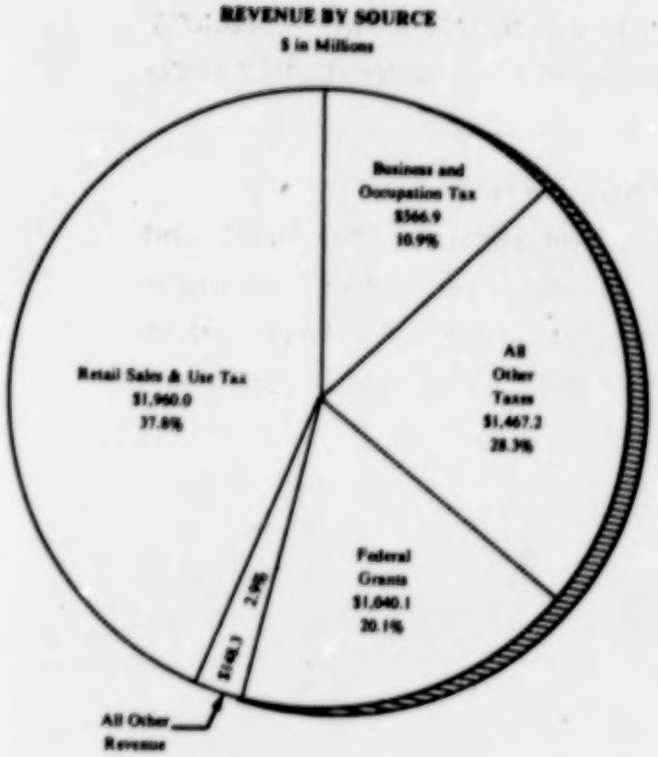
RICHARD H. HOLMQUIST
Senior Assistant Attorney General

MATTHEW J. COYLE
Assistant Attorney General

Attorneys for Petitioner.

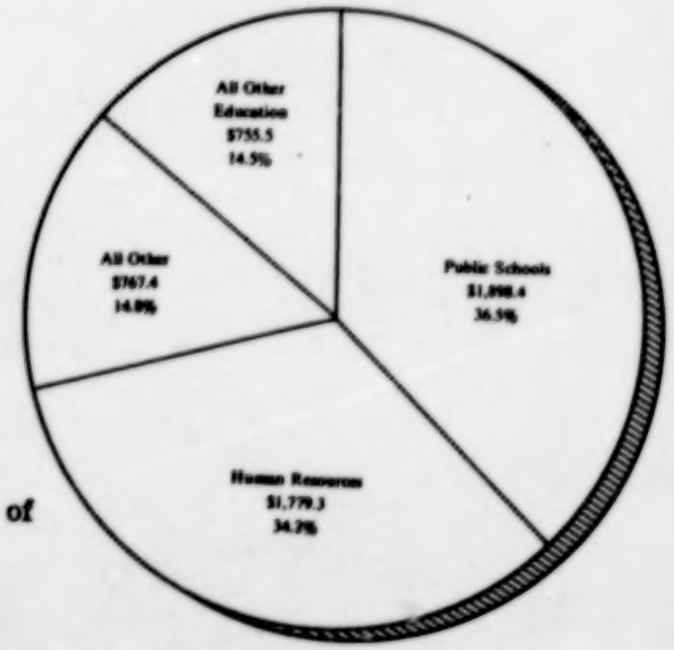
APPENDIX A

1977-79 GENERAL FUND BUDGET



THE BUDGET DOLLAR — WHERE IT COMES FROM

Taxes	77¢
Federal Grants	20¢
All Other	3¢



THE BUDGET DOLLAR — WHERE IT GOES

Education	51¢
Human Resources	34¢
All Other	15¢

Source: 1977-79 Budget Message of Governor Dixy Lee Ray